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No. 00-836

IN THE

Supreme Court of the United States

GEORGE W. BUSH,

Petitioner,

v.

PALM BEACH COUNTY CANVASSING BOARD, *ET AL.*,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Florida

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Supreme Court of Florida has held that the Secretary of State cannot certify election results in accordance with preexisting Florida law and must instead wait for the statutorily untimely results of manual recounts conducted in three Florida counties before certifying the results of the November 7, 2000 presidential election. This holding raises three substantial federal questions that warrant immediate review by this Court:

1. Whether post-election judicial limitations on the discretion granted by the legislature to state executive officials to certify election results, and/or post-election judicially created standards for the determination of controversies concerning the appointment of presidential electors, violate the Due Process Clause or 3 U.S.C. § 5, which requires that a State resolve controversies relating to the appointment of electors under "laws enacted prior to" election day.

2. Whether the state court's decision, which cannot be reconciled with state statutes enacted before the election was held, is inconsistent with Article II, Section 1, clause 2 of the Constitution, which provides that electors shall be appointed by each State "in such Manner as the Legislature thereof may direct."

3. Whether the use of arbitrary, standardless, and selective manual recounts that threaten to overturn the results of the election for President of the United States violates the Equal Protection or Due Process Clauses, or the First Amendment.

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PARTIES TO THE PROCEEDING

The following individuals and entities are parties to the proceeding in the court below:

Governor George W. Bush, as candidate for President; Katherine Harris, as Secretary of State, State of Florida; Katherine Harris, Bob Crawford, and Laurence C. Roberts, as members of the Elections Canvassing Commission; Matt Butler; Palm Beach County Canvassing Board; Broward County Canvassing Board; Broward County Supervisor of Elections; Robert A. Butterworth, as Attorney General, State of Florida; Florida Democratic Party; and Vice President Albert Gore, Jr., as candidate for President.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner George W. Bush, the candidate of the Republican Party for the office of President of the United States, respectfully prays that a writ of certiorari be issued to review the judgment of the Supreme Court of Florida in this case. In plain contravention of the requirements of the Constitution of the United States and federal law, the state supreme court has embarked on an *ad hoc*, standardless, and lawless exercise of judicial power, which appears designed to thwart the will of the electorate as well as the considered judgments of Florida's executive and legislative branches. Because the selection of presidential electors is governed directly by the Constitution and congressional enactments, as well as by state law, the court's decision involves issues of the utmost *federal* importance.

OPINIONS BELOW

The opinion of the Supreme Court of Florida (App., *infra*, 1a-39a) is not yet reported. The orders of the Circuit Court of the Second Judicial District for the County of Leon, Florida (App., *infra*, 43a-44a & 45a-51a) are not reported.

JURISDICTION

The judgment of the Supreme Court of Florida was entered on November 21, 2000. The jurisdiction of this Court rests upon 28 U.S.C. § 1257.

The decision below compels the Florida Secretary of State and Elections Canvassing Commission to accept, and include in the State's certification of election returns, untimely election results derived from selective manual recounts being conducted in certain Florida counties. App., *infra*, 42a. The judgment below is therefore "final" for purposes of this Court's jurisdiction under § 1257; indeed, it amounts to the entry of a per-

manent injunction against the responsible state officials. *Market Street Ry. Co. v. Railroad Comm'n*, 324 U.S. 548, 551 (1945) (entry of injunction is "an effective determination of the litigation and not of merely interlocutory or intermediate steps therein").

As demonstrated *infra*, petitioner expressly raised below the federal questions presented in this petition. Accordingly, the Florida Supreme Court's failure to address petitioner's federal claims, and its assertion that "[n]either party has raised as an issue on appeal the constitutionality of Florida's election laws" (App., *infra*, 11a, n.10), is no barrier to review by this Court. "The issue of whether a federal question was sufficiently and properly raised in the state courts is itself ultimately a federal question, as to which this Court is not bound by the decision of the state courts." *Street v. New York*, 394 U.S. 576, 583 (1969). *See also Black v. Cutter Labs.*, 351 U.S. 292, 298 (1956) (this Court has a "duty to . . . determine for ourselves precisely the ground on which the judgment rests"). Accordingly, a state court cannot evade this Court's review by failing to discuss federal questions in its opinion. *Chapman v. Goodnow's Adm'r.*, 123 U.S. 540, 548 (1887) ("If a federal question is fairly presented by the record, and its decision is actually necessary to the determination of the case, a judgment which rejects a claim, but avoids all reference to it, is as much against the right . . . as if it has been specifically referred to and the right directly refused.").

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Title 3, Section 5 of the United States Code provides: "If any State shall have provided, by laws enacted prior to the day fixed for the appointment of the electors, for its final determination of any controversy or contest concerning the appointment of all or any of the electors of such State, by judicial or other methods or procedures, and such determination shall have been made at least six days before the time fixed for the meeting of the electors, such determination made pursuant to such law so existing on said day, and made at least six days prior to said time of meeting of the electors, shall be conclusive, and shall govern in the counting of the electoral votes as provided in the Constitution, and as hereinafter regulated, so far as the ascertainment of the electors appointed by such State is concerned." 3 U.S.C. § 5.

Article II, Section 1, Clause 2 of the Constitution provides: "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector."

The Fourteenth Amendment to the Constitution of the United States provides, in pertinent part, that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

The First Amendment to the Constitution of the United States provides, in pertinent part, that "Congress shall make no law . . . abridging the freedom of speech, . . . or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

Pursuant to this Court's Rule 14.1(f), the provisions of Florida election law involved in this case, including Fla. Stat. §§ 102.111, 102.112, 102.141(4), 102.166, 102.168, and 106.23, are set forth at App., *infra*, 52a-61a.

STATEMENT OF THE CASE

On Tuesday, November 7, 2000, the citizens of the several States, including Florida, cast their votes for the electors for the President and Vice President of the United States. An initial count of the ballots cast in Florida showed that Governor George W. Bush and Dick Cheney received the most votes in the election, subject to the counting of absentee ballots. Because the margin of victory was less than .5 percent, however, an automatic statewide recount commenced. *See* Fla. Stat. § 102.141(4). The automatic statewide recount confirmed that Gov. Bush and Secretary Cheney received the most votes. The absentee ballots have now been counted, and Gov. Bush and Secretary Cheney again have received the most votes. Nonetheless, the outcome of the Florida election has not been certified, and the American people are still uncertain as to who their next President will be. Petitioners have no choice but to seek this Court's intervention.

I. The Underlying Litigation

Once election results had been tabulated in most of the other states in the union, it became apparent that the victor in the State of Florida would almost certainly be the next President of the United States. Dissatisfied with the results of the initial count and the automatic recount, officials of the Democratic Party filed requests for manual recounts in four selected Florida counties: Broward, Miami-Dade, Palm Beach, and Volusia Counties. In each of these counties, Vice President Gore had received a substantial majority of the votes cast in the election.

As this Court is undoubtedly aware, the chaos that erupted in the wake of these selectively focused requests for manual recounts has been striking. Unrestrained by statutory guidance, the counties have embarked upon various paths in attempting to divine the "intent of the voters." Counties have adopted conflicting guidelines

for achieving this goal, and have repeatedly changed guidelines and standards in the midst of the recounting process. The widely varying and inconsistent policies (or lack of policies) underscores the absurdity of the purported objective of a manual recount conducted under these conditions. A manual recount in selected limited counties without consistent standards according to guidelines that are constantly changing and where subjective judgments are being exercised by persons who know that their decisions may alter the results of the presidential election will not yield a more accurate tabulation than the original statewide machine count, it will simply undermine the credibility and integrity of any final result.

The manual recount process has also undermined the physical integrity of the voters' ballots. Ballots have been damaged throughout the manual recount process by being twisted, rumpled, creased, and dropped; some have been stained with ink, poked with pens, and crushed. This aggressive, careless treatment of the ballots has apparently changed their original character in that chads, still attached after voters cast the ballots, have been dislodged in bunches, littering the floor of the recount rooms. It has become impossible to determine the actual condition of the ballots as they appeared when they were cast in the November 7 election in the specified counties.

The chaos and confusion over the manual recount process has triggered numerous legal actions. Two of those legal actions reached the Florida Supreme Court and are the subject of this petition.

A. The Recount Authority Litigation

One lawsuit at issue involves the authority of the selected counties to conduct a manual recount of the votes cast on November 7. This proceeding centers on a request by the Palm Beach County Canvassing Board, which asked whether an "error in the vote tabulation"

under Florida election law (Fla. Stat. § 102.166(5)), which was the statutory condition precedent for the exercise of the authority to initiate manual recount proceedings, referred to errors in the tabulation system itself or, more broadly, included discrepancies between the number of votes determined by the tabulation system and a sample manual recount. Exhibits A and B, attached to Palm Beach County Canvassing Board's Emergency Petition For Extraordinary Writ in case number SC00-2346.

In response to the Palm Beach request, the state Division of Elections, the State office charged by the legislature with responsibility for interpreting Florida election law, Fla. Stat. § 106.23, issued an opinion that manual recounts are not authorized unless the County Canvassing Board concludes that "the vote tabulation system fails to count . . . properly punched punchcard ballots." Exhibit C, attached to Palm Beach County Canvassing Board's Emergency Petition For Extraordinary Writ in case number SC00-2346. The opinion continued that "unless the discrepancy between the number of votes determined by the tabulation system and by the manual recount of four precincts is caused by incorrect election parameters or software errors, the county canvassing board is not authorized to manually recount ballots for the entire county. . . ." *Id.* The following day Florida's Attorney General issued an advisory opinion on the same issue that contradicted the Division of Election's advisory opinion. Exhibit D, attached to Palm Beach County Canvassing Board's Emergency Petition For Extraordinary Writ in case number SC00-2346.

In response to these conflicting opinions from the Florida executive branch, the Palm Beach County Canvassing Board filed a pleading with the Florida Supreme Court in which it asked the court to resolve the conflict.

B. The Recount Certification Litigation

The second legal proceeding relevant to this petition arose out of the Florida statutory deadline for certifying election results, which by law is set for 5:00 p.m. on the seventh day after the election, *i.e.*, Tuesday, November 14. Fla. Stat. § 102.111(1).[1] After a Florida Circuit Court enjoined the Secretary of State from declaring that all manual recounts had to be completed by the statutory deadline and directed her to exercise her discretion to determine whether to include untimely election returns in her certification of the election results, the Secretary asked counties interested in submitting explanations for extending the deadline to do so by 2:00 p.m. on Wednesday, November 15. FDEC App. 5, Ex. E.[2] After receiving submissions from four counties (FDEC App. 5, Ex. O), the Secretary of State exercised her discretion and concluded that insufficient reasons had been given to justify extending the deadline to include the results of manual recounts not yet complete. FDEC App. 5, Ex. H.

Vice President Gore and others sued for an order directing the Secretary to waive the statutory deadline and allow late results from three counties—Broward, Miami-Dade, and Palm Beach—to be included in the final vote tally. FDEC App. 12. On November 17, after a hearing the previous afternoon, the Circuit Court for Leon County issued its decision denying the motion. FDEC App. 13. The court held that the Secretary of State had not violated its November 14 Order and explained that

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[1] Volusia County submitted its manual recount results before the 5:00 p.m., November 14 deadline and, therefore, is in a different category than the other three counties.

[2] "FDEC App." refers to the Appendix to the Initial Brief filed on behalf of Albert Gore, Jr., and the Florida Democratic Executive Committee in the court below.

"the Secretary has exercised her reasoned judgment to determine what relevant factors and criteria should be considered, applied them to the facts and circumstances pertinent to the individual counties involved, and made her decision." App., *infra*, 44a.

II. Proceedings In The Florida Supreme Court

The Supreme Court of Florida consolidated the two cases discussed above: (a) the original action brought by the Palm Beach County Canvassing Board asking the court to resolve the conflicting advisory opinions issued by the Division of Elections and the Attorney General; and (b) the appeal from the Leon County Circuit Court's decision that the Secretary of State had not abused her discretion in deciding not to include results from manual recounts filed after the 5:00 p.m. November 14 deadline in the statewide tabulation.

A. The State Court's Decision

On Friday, November 17, 2000, the Florida Supreme Court *sua sponte* enjoined the Secretary of State from certifying the November 7 presidential election results for the State of Florida until further order from the Court. App., *infra*, 40a-41a. On Monday, November 20, after weekend briefing by the parties, the court heard oral argument.

Late on the evening of November 21, 2000, the Florida Supreme Court issued its opinion reversing the orders of the state trial court. App., *infra*, 1a-39a. The supreme court held that the trial court "erred in holding that the Secretary [of State] acted within her discretion in prematurely rejecting any amended returns that would be the result of ongoing manual recounts." App., *infra*, 35a. The supreme court reached this conclusion by announcing a new rule of law to constrain the Secretary's discretion under Fla. Stat. §§ 102.111 and 102.112, declaring for the first time that "the Secretary may reject a Board's amended returns only if the returns are submitted so late that their inclusion will preclude a candidate from contesting the certification or preclude Florida's voters from participating fully in the federal electoral process." *Id.* at 37a. Based on this newly fashioned, hitherto unrecognized rule of law, the Florida Supreme Court directed the Secretary of State to accept untimely manual recount returns through Sunday, November 26, 2000. *Id.* at 38a-39a. Moreover, the court maintained its injunction preventing the Secretary from certifying any election results by that date, and directed the Secretary to include in her certified election results all manual recount returns received by that date. *Id.* at 39a.

B. The Federal Issues Were Raised And Ruled On Below

Each of the issues presented by this petition was expressly raised in the court below. *First*, petitioners argued that a *post hoc* judicial decision on the appointment of electors would violate 3 U.S.C. § 5, which requires that any such disputes be resolved in accordance with laws enacted prior to election day. Bush Answer Br. 42-43; App., *infra*, 62a. *Second*, petitioners contended that any decision overriding the Florida legislature's procedures for appointing electors (including the November 14 deadline for certifying votes) would violate Article II, which vests sole authority over such matters in the legislatures of the several States. Bush Answer Br. 43 n.15; App., *infra*, 62a-63a, n.15. And *third*, petitioners argued that the manual recount being sought by the Gore faction would "violat[e] the United States Constitution," by diluting votes in violation of the Due Process and Equal Protection Clauses, by allowing standardless decision-making in the voting arena in violation of the Due Process Clause, and by impairing the right of association through voting in violation of the First Amendment. Bush Answer Br. 43-44; App., *infra*, 63a-64a.

As noted above, the Supreme Court of Florida did not expressly rule on petitioner's federal claims. Be-

cause the judgment below necessarily rejects those federal claims on the merits, however, those federal questions are squarely presented here.

REASONS FOR GRANTING THE PETITION

Few issues could be more important than those presented in this case. At stake is the lawful resolution of a national election for the office of President of the United States. As this Court has often recognized, the American public's right to vote is one of the most sacred protected by our Constitution: "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined." *Williams v. Rhodes*, 393 U.S. 23, 31 (1968) (quoting *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964)). The Florida Supreme Court's decision poses a clear and present danger to that right, and should be corrected forthwith to ensure that our Nation continues to be governed by the rule of law.

The choosing of presidential electors is a matter of great national importance and interest. As this Court stated in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), "[I]n the context of a Presidential election, state-imposed restrictions implicate a uniquely important national interest. For the President and Vice President of the United States are the only elected officials who represent all the voters in the Nation. Moreover, the impact of the votes cast in each State is affected by the votes cast for the various candidates in other States." *Id.* at 794-95. Given the national significance of the Florida election results, it is essential that the counting of ballots be conducted in a fair and consistent manner in accordance with established Florida law. Counties in Florida, however, have undergone a blatantly arbitrary, subjective, and standardless process in attempting to count ballots by hand in an effort to divine the intent of the voters. The Nation's citizens have witnessed this standardless process unfold as they anxiously await a resolution of the election outcome. By retroactively changing the law in Florida through judicial intervention, the Supreme Court of Florida's decision preventing the Secretary of State of Florida from exercising her legislatively conferred authority to perform the act of certification that would complete the electoral process in Florida has added to that angst and has strayed from established federal constitutional and statutory law.

Governor George W. Bush and Dick Cheney received the most votes cast in Florida, as initially counted, as recounted, and as retabulated again after receipt of overseas ballots. Nevertheless, the Secretary of State of Florida has been precluded from certifying these results or appointing electors in accordance with that popular vote, pending the completion of an arbitrary, standardless and selective manual recount of ballots cast in three heavily populated, predominantly Democratic counties in Florida.

This Court's review of the Supreme Court of Florida's decision is warranted because it "decided an important federal question that conflicts with relevant decisions of this Court," Sup. Ct. R. 10(c); it "decided an important federal question in a way that conflicts with the decision of . . . a United States court of appeals," Sup. Ct. R. 10(b); and it "decided an important question of federal law that has not been, but should be, settled by this Court . . . ." Sup. Ct. R. 10(c). As discussed in greater detail below, this case presents important questions regarding the federal statutory and constitutional restraints on the ability of States to impose *post hoc* requirements on the appointment of presidential electors, and to change requirements for the resolution of controversies concerning the appointment of electors. The decision below also conflicts with precedents of this Court and the court of appeals regarding the scope of the First and Fourteenth Amendment protections for the funda-

mental right to vote. Moreover, these important questions are presented in the context of one of the closest elections for President in our Nation's history.

There is a profound national interest in ensuring the fairness and finality of elections, particularly an election for the highest office in the land. This is precisely the type of question that the Nation justifiably expects this Court to decide. Indeed, absent a decision by this Court, the election results from Florida could lack finality and legitimacy. The consequence may be the ascension of a President of questionable legitimacy, or a constitutional crisis. Quite simply, this is the sort of case that this Court should unquestionably hear.

I. Review Is Warranted In This Case Because The Florida Supreme Court Disregarded Federal Law Governing Disputes Over The Appointment Of Electors

Although election procedures are often governed exclusively by state law, that is not the case in elections for the members of the Electoral College, who choose the President and Vice President of the United States. While some of the details of appointing presidential electors are left to the several States, the basic framework is established by the Constitution itself, in Section 1 of Article II and the Twelfth Amendment. Moreover, Congress has enacted legislation to implement the constitutional framework, and those federal laws, of course, reign supreme over state laws in this area. U.S. CONST., art. VI, cl. 2.

In particular, Congress has provided that when "any controversy or contest concerning the appointment of all or any of the electors" from a State arises, the dispute must be resolved exclusively by reference to "laws enacted *prior to*" election day. 3 U.S.C. § 5 (emphasis added). The evident purpose of this federal law is to ensure that the applicable rules cannot be changed once the voters have gone to the polls. As Representative William Craig Cooper of Ohio explained in the congressional debate on this provision (Act of Feb. 3, 1887, ch. 90, § 2, 24 Stat. 373), "these contests, these disputes between rival electors, between persons claiming to have been appointed electors, should be settled under a law made prior to the day when such contests are to be decided." 18 CONG. REC. 47 (Dec. 8, 1886) (remarks of Rep. Cooper); *see also id.* ("these contests should be decided under and by virtue of laws made prior to the exigency under which they arose"); *id.* ("How could any court, how could any tribunal intelligently solve the claims of parties under a law which is made concurrent, to the very moment perhaps, with the trouble which they are to settle under the law?"). Representative Cooper's concerns, although expressed more than a century ago, seem remarkably prescient when read against the backdrop of events of the past fifteen days in Florida. As he asked rhetorically, in opposing the views of congressional Democrats who wished to permit the use of retroactive rulemaking to resolve electoral disputes: "To what anarchy, to what confusion, to what riot, if you please, Mr. Speaker, might such a course of procedure lead!" *Id.*

Despite the express federal statutory prohibition against the *post hoc* creation of new legal rules to affect the outcome of controversies over the appointment of presidential electors, the Supreme Court of Florida has authorized a clear departure from the established legal requirements set forth by the Florida Legislature that were in place on November 7. Prior to election day 2000, the Florida Legislature had enacted clear legislative directives regarding the certification of votes cast in the Presidential election. Under § 102.111 of the Florida Statutes, for example, election returns by county canvassing boards "must be filed by 5:00 p.m. on the 7th day following the . . . general election . . . ." By contrast, under the new rule of law announced by the decision below, the effective deadline for submission of election returns has been extended from November 14

until November 26 (App., *infra*, 37a), nearly tripling the statutory seven-day time period mandated by the Florida Legislature.

In addition, § 102.112 of the Florida Statutes provides that the Elections Canvassing Commission "shall . . . ignore[]" county returns filed after 5:00 p.m. on the seventh day following the election, and "shall . . . certif[y]" the election based on the results returned before the deadline. Section 102.111(1) confirms that late-filed returns "may be ignored" by the Elections Canvassing Commission.[3] *See* Fla. Stat. § 102.112. Notwithstanding this clear, and preexisting, legislative directive, the Supreme Court of Florida has now concluded retroactively that the Elections Canvassing Commission could

[3] Section 102.112(1) of the Florida statutes provides that if election returns are not received by the Department of State by 5:00 p.m. on the seventh day following the election, the returns "may be ignored." This statute, enacted in 1989, appears to have been passed in response to the Supreme Court of Florida's decision in *Chappell v. Martinez*, 536 So. 2d 1007 (Fla. 1988). In *Chappell*, one of the six counties in the Fourth Congressional District failed to submit its original certificate until two days after the statutory deadline in § 102.111. The county had, however, informed the Department of State by telephone of its results prior to the deadline. The supreme court ruled that the county had substantially complied with § 102.111 and thus allowed the county's votes to count. *See Chappell*, 536 So. 2d at 1008-09. In passing § 102.112, however, the State Legislature did not repeal § 102.111. Nor does this case involve a situation like that at issue in *Chappell*, in which a county conducting a recount informed the Department of State of its results prior to the deadline, but simply failed to submit its official results in writing by the deadline. In any event, as discussed below, § 102.112 states that late results *may* be ignored, not that such results *may not* be ignored, as the Florida Supreme Court has now directed.

not ignore late-filed returns, but *must* hold the results of a national election open for an additional extended period of time, pending the completion of selective manual recounts in individual counties. App., *infra*, 34a-37a.

In addition, the judicially established waiver of the statutory deadline contained in § 102.112, is contrary to the legislative provisions contained in § 102.168 providing for contests to election results. *See* Fla. Stat. § 102.168. That statute clearly anticipates that results will be certified in a timely fashion, in order for the results to be contested in court. Pushing back the deadline for certification by judicial fiat thus runs headlong into the Florida Legislature's intent to allow a period of time for court challenges.

The Supreme Court of Florida's decision also deviated from its prior decisions making clear that the "judgments" of officials such as the Secretary of State in fulfilling their specifically charged duties in the election process "are entitled to be regarded by the courts as presumptively correct." *Krivanek v. The Take Back Tampa Political Comm.*, 625 So. 2d 840, 844 (Fla. 1993) (quoting *Boardman v. Esteva*, 323 So. 2d 259, 268 n.5 (Fla. 1975)); *see also Greyhound Lines, Inc. v. Yarborough*, 275 So. 2d 1, 3 (Fla. 1973) ("This Court has often reiterated the principle that a construction of a statute by the administrative body in whom authority to administer is reposed is entitled to great weight and should not be overturned unless clearly contrary to the language of the statute."). This arbitrary judicial departure from the well-established law of Florida—as it plainly stood prior to November 7, 2000—is in flagrant violation of Congress's federally imposed requirement that controversy over the appointment of electors be resolved solely un-

der legal standards "enacted prior to" the date of the election. 3 U.S.C. § 5.[4]

Even if the Secretary of State *might* be authorized to excuse county board noncompliance with the 5:00 p.m. November 14 deadline (*see* Fla. Stat. § 102.112), nothing in Florida law as it existed before November 7, 2000, *required* that she do so, and certainly there was no preexisting rule of Florida law that mandated that result in the circumstances presented here. The Florida Legislature directly contemplated close elections when it enacted the controlling statutory provisions at issue here. Indeed, the State's legislative body required that when the margin of victory in an election is less than .5 percent, an automatic statewide recount is to be held. *See* Fla. Stat. § 102.141(4). The Florida Legislature also contemplated that manual recounts might be requested by candidates or parties (but not by voters) in some circumstances, but established no standards to guide the discretion of county canvassing boards in determining whether to conduct such manual recounts *See* Fla. Stat.

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[4] The Supreme Court of Florida purported to follow prior Florida case law in reaching its decision but that claim is manifestly without foundation. Under 3 U.S.C. § 5, of course, this Court has an independent obligation to ensure that Florida resolves any controversies over appointment of electors by reference to the rules of law enacted prior to the election, not *post hoc* standards announced for the first time some two weeks after the election. Moreover, this Court has repeatedly recognized that when a state court rests its decision on a nonfederal ground that "is so plainly unfounded that it may be regarded as essentially arbitrary," such action does not remove consideration of the federal question from this Court's jurisdiction. *See McCoy v. Shaw*, 277 U.S. 302, 303 (1928); *Enterprise Irrigation Dist. v. Farmers Mut. Canal Co.*, 243 U.S. 157, 164 (1917); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 454-55 (1958).

§ 102.166(4)(c). In passing §§ 102.111 and 102.112, however, the legislature plainly determined that finality had an important place in the certification process as well.

The Florida Legislature thus consciously weighed the interests of finality against competing interests supporting manual recounts. It is clear from the legislative enactments that the court struck the balance between finality and manual recounts in such a way that ongoing manual recounts do not warrant abandoning the statutorily imposed deadline found in §§ 102.111 and 102.112, unless, in the most permissive reading of the statutes, the Secretary of State decides in her lawfully granted discretion that such late-filed returns should be included in the final election results. Where, as here, no preexisting rule of law required (or even authoritatively authorized) the Secretary of State to waive the time limit on the facts presented, 3 U.S.C. § 5 precludes the retroactive enforcement of a new rule of law compelling that previously unknown result.

The federal rule enunciated by Congress in 3 U.S.C. § 5 serves obvious and important public policy interests by prohibiting precisely what is happening in Florida today, where the candidate who did not receive the most votes and his supporters are attempting to overturn the results of the Presidential election by changing the rules after the election has been held. Section 5's prohibition against such retroactive rulemaking in the election context provides a statutory corollary to the principle of federal constitutional law recognized by the Eleventh Circuit in *Roe v. Alabama*, 43 F.3d 574 (11th Cir. 1995). As the court of appeals held in that case, constitutional principles of due process and fundamental fairness preclude the States from adopting "a post-election departure from previous practice" and applying that post-election rule retroactively to determine the outcome of an election. *Id.* at 581. Here, as in *Roe*, "had the candidates . . . known" that the state supreme court would retroactively

extend the deadline for submission of election returns notwithstanding the plain language of the governing statutes, "campaign strategies would have taken this into account . . . ." *Id.* at 582. Indeed, the candidates' decisions whether to seek a manual recount in specific additional counties might well have been affected had petitioner and other candidates known that the Florida Supreme Court would subsequently extend the statutory deadline nearly threefold.

The application of 3 U.S.C. § 5 in these circumstances is straightforward. Perhaps because no candidate has previously resisted so strenuously and resourcefully, the certification of election results as has Vice President Gore, this Court has not previously been called upon to decide whether or not the States must adhere to preexisting law in resolving election disputes. But the plain language of the federal statute indicates that they *must* do so, and it is also plain that the Florida Supreme Court failed to do so. Given the importance of the issue to the Nation, this is not a question that can await further development in the lower courts. The Court should decide—now—whether or not Congress meant what it said when it directed that controversies concerning the appointment of electors be decided only "by laws enacted prior to" election day. 3 U.S.C. § 5; *see* Sup. Ct. R. 10(c) (including among the considerations supporting review in this Court, state court decisions that decide "an important question of federal law that has not been, but should be, settled by this Court"). If Congress did, then the judgment below must be reversed.

II. Review Is Warranted Because The Court Below Disregarded Constitutional Limitations On The Appointment Of Electors

The congressional directive that States decide controversies concerning electors according to "laws enacted prior to" election day (3 U.S.C. § 5) is derived from the constitutional command that each State appoint

electors "in such Manner as the Legislature thereof may direct." U.S. Const. art. II, § 1, cl. 2. Significantly, the Framers did not see fit to leave the mechanics of electoral appointment to either the judicial or executive branch of the several States, but instead entrusted the legislative arm—the one, as in the federal government, most representative of the popular will—with authority to articulate the standards by which electors would be chosen.

In Florida, the "manner" in which the legislature has directed that electors be appointed is quite clear. The citizens vote for them on Election Day (which is established by federal law), and the various counties must certify the results of the election to the state Division of Elections by 5:00 p.m. the following Tuesday. Fla. Stat. § 102.112. As soon as practicable thereafter, the legislature has commanded that the results of the election "shall" (or at least "may") be certified, while the results from any counties not reporting before the statutory deadline "shall" (or, again, at least "may") be ignored. Fla. Stat. §§ 102.111, 102.112. Notably, the creation of this timetable intentionally leaves time for election contests, as the legislature clearly provided for in § 102.168. Under this legislative directive, the results in Florida—as all acknowledge—are clear: The electors for the Republican candidates garnered more votes before the statutory deadline, and that outcome did not change when the results of absentee balloting (which, under federal law, must be counted notwithstanding the state deadline) were considered.

The Florida Supreme Court has seen fit to revise the "manner" in which Florida's electors are chosen by directing the Secretary of State to consider results from those counties that are conducting manual recounts, notwithstanding the fact that the statutory deadline has long since passed and no waiver of that deadline has been granted by the State agency authorized by the legislature to grant such relief: the Elections Canvassing

Commission. The Constitution admits of no such *post hoc* alterations to the scheme of electoral appointments. Had the Florida legislature seen fit to vest the decision in the hands of the judiciary, presumably it could have done so; but the simple fact is that it did *not* do so.

It is no accident that Article II reserves the manner of selecting electors to the *legislatures* of the several States. As this Court has explained, "[t]hat was not a term of uncertain meaning when incorporated into the Constitution. What it meant when adopted it still means for the purposes of interpretation. A Legislature was then the representative body which made the laws of the people." *Hawke v. Smith*, 253 U.S. 221, 227 (1920). And then, as now, a legislature was *not* a state court, sitting after the fact to decide what rules should be adopted and applied. Rather, by requiring the legislative branch to set forth the manner in which electors would be chosen, the Framers undoubtedly wanted to ensure that the rules would be specified in advance in order that there could be no doubt that their application in particular circumstances was reflective of the will of the people. The events in Florida have only confirmed the wisdom of the constitutional design, faithful adherence to which requires that this Court review the Florida Supreme Court's usurpation of legislative power in defiance of the Constitution's plan.

III. Review Is Warranted Because The Supreme Court Of Florida's Decision Conflicts With This Court's And Eleventh Circuit Precedent And The Recount Procedures Sanctioned By The Court Below Do Not Pass Constitutional Muster

The Florida Supreme Court's decision opens the door to an electoral catastrophe. The court below has essentially given the green light to a standardless exercise in which vote-counters in a few, carefully selected counties will divine the "intent of the electorate" without

any legislative guidance or uniform standards. The process therefore varies from county to county, and criteria for counting ballots as votes has changed repeatedly in each recount county. Voters in counties not selected for recount will have ballots tabulated pursuant to wholly different, less permissive standards. The results of such lawlessness cannot be squared with fundamental principles of our constitutional structure.

When it became apparent that some Florida officials were bent on paving the road to chaos that the state supreme court has now endorsed, Governor Bush and Secretary Cheney, and various Florida voters, sought an injunction in federal court. Both the district court and the court of appeals denied their request for an interlocutory injunction, although the appellate court did not foreclose the possibility of appropriate relief if necessary. Petitioner Bush, among others, has petitioned this Court for review of the federal case (*Siegel v. LePore*, No. 00-___, filed contemporaneously herewith), which raises the same fundamental due process and equal protection constitutional questions as does the Florida Supreme Court's decision. Since those questions are addressed more fully in that petition, which is being submitted to the Court concurrently with this one, Petitioner will only summarize the constitutional problems here.

A. Equal Protection

The dilution of the weight of a citizen's vote constitutes a denial of the right to vote. *Reynolds v. Sims*, 377 U.S. 533, 555 (1964). As a result, the Equal Protection Clause demands that the votes of similarly situated voters be given similar effect. *See, e.g., O'Brien v. Skinner*, 414 U.S. 524 (1974); *Roman v. Sincock*, 377 U.S. 695 (1964); *WMCA, Inc. v. Lomenzo*, 377 U.S. 633 (1964). Florida's selective manual recount procedures, as approved by the court below, arbitrarily treat voters differently simply because they happen to live in different parts of the State, and accordingly conflict with prece-

dent of this Court cited above. A partially punched ballot, for example, may not be counted at all in most counties, might be counted as a vote in other counties, and in some counties it might be counted as a vote or not—depending on which set of ever-changing rules the election officials happen to be applying at the time it is reviewed. This has the effect not only of arbitrarily denying the right to vote to some persons, but of diluting the votes of the majority of Floridians who correctly cast their ballots. Either way, the present regime cannot withstand equal protection analysis.

The Supreme Court of Florida's decision cannot be reconciled with this Court's opinion in *O'Brien*, in which it struck down a New York law that allowed an inmate incarcerated outside of his home county to cast an absentee ballot, while not allowing a similarly situated inmate to cast a ballot when incarcerated within his home county. *See O'Brien*, 414 U.S. at 528-30. The manual recount scheme condoned by the Supreme Court of Florida suffers from failings similar to those contained in the New York law struck down in *O'Brien*. The right of a citizen to vote, and to have that vote counted equally to the votes of others similarly situated, cannot be infringed on the sole basis of the county in which the citizen resides, anymore than on the basis of the county in which a prisoner is incarcerated. Because the Supreme Court of Florida's decision "conflicts with [a] relevant decision[] of this Court," review is warranted. Sup. Ct. R. 10(c).

The decision below also directly conflicts with the Eleventh Circuit's decision in *Roe v. Alabama*, 43 F.3d 574 (11th Cir. 1995). The court below held that conducting manual recounts in selected Democratic counties in the State long past the seven-day deadline imposed by state law and in a manner flatly inconsistent with the authoritative interpretation of the law by the state official charged with enforcing it does not violate the federal Constitution. In *Roe*, by contrast, as discussed above, the Eleventh Circuit held that to change the voting rules after election day and thus count some votes that should not be counted would unconstitutionally dilute the votes of those who complied with the established voting requirements. *Id.* at 581-82. In this case, conducting a manual recount in selected counties with no established standards in place to determine whether to conduct such manual recounts and, if so, what procedures to follow, subjects identically situated voters to different treatment solely on account of the county in which they reside. To include ballots in the final statewide tally that were counted solely because they were subjected to the different scrutiny attendant to a manual recount, would be as improper in this case as counting the noncompliant ballots at issue in *Roe*. As in *Roe*, the counting of ballots that should not be counted will unconstitutionally dilute the votes of those who properly cast their ballots on election day and those who do not live in the counties selected for a manual recount. In addition to being erroneous as a general matter, therefore, the Supreme Court of Florida's decision also fails to comport with the Eleventh Circuit's holding in *Roe*. This conflict further supports review in this Court. Sup. Ct. R. 10(b).

B. Due Process

The manual recount underway in certain Florida counties is unconstitutional because it is being conducted in the absence of meaningful objective standards. The officials responsible for overseeing the turmoil and constantly changing process that the nation has been watching for the past two weeks have failed to articulate rules for when a recount will be ordered, how long it will take, how it will be conducted, what votes will (and will not) be counted, and so on. This uncertainty derives from the fact that Florida law provides no meaningful guidance to help local canvassing boards determine whether to conduct a manual recount and, if so, the process to follow in determining whether to count any

given ballot. The only "standard" conceivably contained in the Florida statutes is the extremely general one that canvassing board's are to attempt "to determine the voter's intent." Fla. Stat. § 102.166(7). This vague statement of generalized purpose absolutely fails to provide any meaningful guide for local canvassing boards to follow in determining *how* to divine the voter's intent.

This total lack of guidance has, not surprisingly, led counties to apply different "standards" to the evaluation process, and, moreover, to the extent such standards have been announced, they have been renounced or changed within minutes or hours. Two counties that voted not to proceed with county-wide manual recounts reversed those decisions within days. The result is a chaotic, and entirely standardless and arbitrary, regime in which a question of national importance is being decided by government actors wholly unconstrained by limits or standards. It does not comport with the minimum standards of due process. *See, e.g., Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982).

Moreover, counties have even departed from their past practices in conducting manual recounts. For example, the Broward County Canvassing Board has previously rejected the *need* for a manual recount in a situation strikingly similar to this one. In 1991, after an initial machine recount of the votes cast in a local city council race changed the margin of victory from five votes to three, the Board declined to conduct a manual recount. The Board concluded that the change in numbers was simply the result of "hanging paper chads" that fell away in the second count, causing two ballots initially counted for the victor to become overvotes (and thus no vote) because holes were actually punched for two candidates. *See Broward County Canvassing Bd. v. Hogan*, 607 So. 2d 508, 509 (Fla. Dist. Ct. App. 1992). The Board determined that such "voter errors . . . are caused by hesitant piercing, no piercing, or intentional or unintentional multiple piercing of computer ballot

cards," and did not warrant a manual recount. *See id.*[5] Despite this prior practice of not conducting manual recounts in cases where a discrepancy between the initial count and a machine recount was due to this kind of "voter error," Broward County opted to change course and conduct a manual recount in this case.

Similarly, Palm Beach County is reportedly considering reversing course from its prior guidelines to count so-called "dimpled" chads. *See* Dan Balz, *Bush Spurns Gore Recount Plan; Fla. Official Rejects New Tallies*, WASH. POST, Nov. 16, 2000, at A1; Don Van Natta, Jr., *Dimpled Votes Are New Hope For Democrats*, N.Y. TIMES, Nov. 22, 2000, at A1, *available at* http://www.nytimes.com/2000/11/22/politics/22DISP.html?pagewanted=2. In the Palm Beach County guidelines on counting ballots issued in November 1990, however, the County Canvassing Board made clear that "a chad that is fully attached, bearing only an indentation, should not be counted as a vote." *See* Guidelines on Ballots With Chads Not Completely Removed, Adopted by the November 6, 1990 Canvassing Board.

The Eleventh Circuit made clear in *Roe* that changing the rules after an election to count ballots that historically had not been counted violates the Due Process Clause. *See Roe v. Alabama*, 43 F.3d 574, 580-81 (11th Cir. 1995). Nonetheless, this is precisely what Broward County and Palm Beach County are doing: They are engaged in a "post-election departure from [their] previous practice[s]." *Id.* at 581. This change in approach in determining whether to conduct a manual recount and, if so, how to count ballots, stands in direct conflict with

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[5] The Fourth District Court of Appeals for Florida upheld the Board's decision not to conduct a manual recount in the *Hogan* case. *See Broward County Canvassing Bd. v. Hogan*, 607 So. 2d 508, 510 (Fla. Dist. Ct. App. 1992).

the Eleventh Circuit's holding in *Roe*. Furthermore, these changes underscore the utter lack of standards in the Florida statute to guide local canvassing boards and the unconstitutional nature of the manual recounts that the Supreme of Court of Florida has approved.

C. First Amendment

Voting is expressive and associational activity protected by the First Amendment. *Williams v. Rhodes*, 393 U.S. 23 (1968). The arbitrary and standardless recounting regime approved by the Florida Supreme Court, however, violates the First Amendment rights of those Floridians who voted. It raises some citizens' voices above others, and drowns out still others. It distorts, and dilutes, the expression of political will that the people of Florida made on November 7—and which has been confirmed in subsequent recounts. It threatens to subvert the views of the many to those of the few, whose votes—after being reviewed according to no discernible, much less articulable, standards—are deemed by interested local officials to have more value than those cast in the rest of the State. The First Amendment cannot withstand such governmental overreaching.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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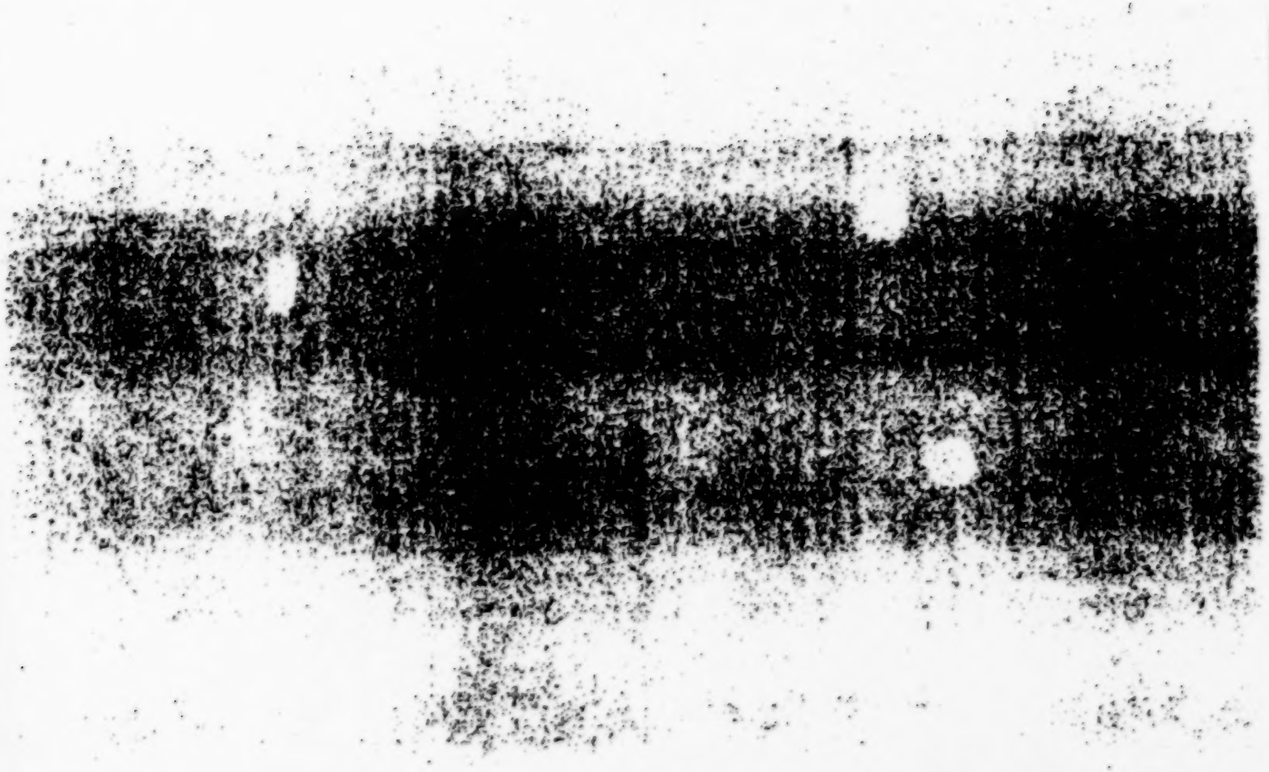
APPENDIX



APPENDIX A

SUPREME COURT OF FLORIDA

Nos. SC00-2346, SC00-2348 & SC00-2349

PALM BEACH COUNTY CANVASSING BOARD,
Petitioner,
vs.
KATHERINE HARRIS, ETC., ET AL.
Respondents.

VOLUSIA COUNTY CANVASSING BOARD, ET AL.,
Appellants,
vs.
KATHERINE HARRIS, ETC., ET AL.
Appellees.

FLORIDA DEMOCRATIC PARTY,
Appellant,
vs.
KATHERINE HARRIS, ETC., ET AL.
Appellees.

[November 21, 2000]

PER CURIAM.

We have for review two related trial court orders appealed to the First District Court of Appeal, which certified the orders to be of great public importance requiring immediate resolution by this Court (Case Numbers SC00-2348 and SC00-2349). We have jurisdiction under article V, section 3(b)(5) of the Florida Constitution. For the reasons set forth in this opinion, we reverse the orders of the trial court.[1]

I. FACTS

A. The Election

On Tuesday, November 7, 2000, the State of Florida, along with the rest of the United States, conducted a general election for the President of the United States. The Division of Elections ("Division") reported on Wednesday, November 8, that George W. Bush, the Republican candidate, had received 2,909,135 votes, and Albert Gore Jr., the Democratic candidate, had received 2,907,351 votes. Because the overall difference in the total votes cast for each candidate was less than one-half of one percent of the total votes cast for that office (i.e., the difference was 1,784 votes), an automatic recount was conducted pursuant to section

[1] The Palm Beach County Canvassing Board has filed in this Court an "Emergency Petition for Extraordinary Writ" against Secretary of State Katherine Harris and others (Case Number SC00-2346). We have examined our jurisdiction under article V, section 3(b)(8) of the Florida Constitution. However, because the issue raised by that separate petition can be disposed of in our pending case and because we have previously stated in our order of November 16, 2000, that there was "no legal impediment" to the manual recounts continuing, we deem it unnecessary to determine if we have a separate basis of jurisdiction for entertaining the writ. Accordingly, by separate order we dismiss the petition.

102.141(4), Florida Statutes.[2] The recount resulted in a substantially reduced figure for the overall difference between the two candidates.

In light of the closeness of the election, the Florida Democratic Executive Committee on Thursday, November 9, requested that manual recounts be conducted in Broward, Palm Beach, and Volusia Counties pursuant to section 102.166, Florida Statutes (2000).[3] Pursuant to section 102.166(4)(d), the county canvassing boards of these counties conducted a sample manual recount of at least one percent of the ballots cast. Initial manual recounts demonstrated the following: In Broward County, a recount of one percent of the ballots indicated a net increase of four votes for Gore; and in Palm Beach County, a recount of four sample precincts yielded a net increase of nineteen votes for Gore. Based on these recounts, several of the county canvassing boards determined that the manual recounts conducted indicated "an error in the vote tabulation which could affect the outcome of the election." Based on this determination, several canvassing boards voted to conduct countywide manual recounts pursuant to section 102.166(5)(c).

[2] Section 102.141(4), Florida Statutes (2000), provides in pertinent part:

> (4) If the returns for any office reflect that a candidate was defeated or eliminated by one-half of a percent or less of the votes cast for such office . . . the board responsible for certifying the results of the vote on such race or measure shall order a recount of the votes cast with respect to such office or measure.

[3] We have not discussed the events in Miami-Dade County because Miami-Dade is not a party nor has it sought to intervene in this case.

B. The Appeal Proceedings

Concerned that the recounts would not be completed prior to the deadline set forth in section 102.111(1), Florida Statutes (2000), requiring that all county returns be certified by 5 p.m. on the seventh day after an election, the Palm Beach County Canvassing Board, pursuant to section 106.23, Florida Statutes (2000), sought an advisory opinion from the Division of Elections, requesting an interpretation of the deadline set forth in sections 102.111 and 102.112. The Division of Elections responded by issuing Advisory Opinion DE 00-10, stating that absent unforseen circumstances, returns from the county must be received by 5 p.m. on the seventh day following the election in order to be included in the certification of the statewide results.

Relying upon this advisory opinion, the Florida Secretary of State (the Secretary) issued a statement on Monday, November 13, 2000, that she would ignore returns of the manual recounts received by the Florida Department of State (the Department) after Tuesday, November 14, 2000, at 5:00 p.m. The Volusia County Canvassing Board (the Volusia Board) on Monday, November 13, 2000, filed suit in the Circuit Court of the Second Judicial Circuit in Leon County, Florida, seeking declaratory and injunctive relief, and the candidates and the Palm Beach County Canvassing Board (the Palm Beach Board), among others, were allowed to intervene. In its suit, the Volusia Board sought a declaratory judgment that it was not bound by the November 14, 2000, deadline and also sought an injunction barring the Secretary from ignoring election returns submitted by the Volusia Board after that date.

The trial court ruled on Tuesday, November 14, 2000, that the deadline was mandatory but that the Volusia Board may amend its returns at a later date and that the Secretary, after "considering all attendant facts and circumstances," may exercise her discretion in

determining whether to ignore the amended returns.[4] Later that day, the Volusia Board filed a notice of appeal of this ruling to the First District Court of Appeal, and the Palm Beach Board filed a notice of joinder in the appeal.

Subsequent to the circuit court's order, the Secretary announced that she was in receipt of certified returns (i.e., the returns resulting from the initial recount) from

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[4] The trial court's order reads in part:

> The County Canvassing Boards are, indeed, mandated to certify and file their returns with the Secretary of State by 5:00 p.m. today, November 14, 2000. There is nothing, however, to prevent the County Canvassing Boards from filing with the Secretary of State further returns after completing a manual recount. It is then up to the Secretary of State, as the Chief Election Officer, to determine whether any such corrective or supplemental returns filed after 5:00 p.m. today, are to be ignored. Just as the County Canvassing Boards have the authority to exercise discretion in determining whether a manual recount should be done, the Secretary of State has the authority to exercise her discretion in reviewing that decision, considering all attendant facts and circumstances, and decide whether to include or to ignore the late filed returns in certifying the election results and declaring the winner.
>
> Just as the Secretary cannot decide ahead of time what late returns should or should not be ignored, it would not be proper for me to do so by injunction. I can lawfully direct the Secretary to properly exercise her discretion in making a decision on the returns, but I cannot enjoin the Secretary to make a particular decision, nor can I rewrite the Statute which, by its plain meaning, mandates the filing of returns by the Canvassing Boards by 5:00 p.m. on November 14, 2000.

McDermott v. Harris, No. 00-2700, unpublished order at 7 (Fla. 2d Cir. Ct. Nov. 14, 2000).

all counties in the State. The Secretary then instructed Florida's Supervisors of Elections (Supervisors) that they must submit to her by 2 p.m., Wednesday, November 15, 2000, a written statement of "the facts and circumstances" justifying any belief on their part that they should be allowed to amend the certified returns previously filed. Four counties submitted their statements on time. After considering the reasons in light of specific criteria,[5] the Secretary on Wednesday,

[5] The criteria considered by the Secretary are as follows:

Facts & Circumstances Warranting Waiver of Statutory Deadline

1. Where there is proof of voter fraud that affects the outcome of the election. *In re Protest of Election Returns*, 707 So. 2d 1170, 1172 (Fla. 3d DCA 1998); *Broward County Canvassing Bd. v. Hogan*, 607 So. 2d 508, 509 (Fla. 4th DCA 1992).

2. Where there has been a substantial noncompliance with statutory election procedures, and reasonable doubt exists as to whether the certified results expressed the will of the voters. *Beckstrom v. Volusia County Canvassing Bd.*, 707 So. 2d 720 (Fla. 1998).

3. Where election officials have made a good faith effort to comply with the statutory deadline and are prevented from timely complying with their duties as a result of an act of God, or extenuating circumstances beyond their control, by way of example, an electrical power outage, a malfunction of the transmitting equipment, or a mechanical malfunction of the voting tabulation system. *McDermott v. Harris*, No. 00-2700 (Fla. 2d Cir. Ct. Nov. 14, 2000).

Facts & Circumstances Not Warranting Waiver of Statutory Deadline

1. Where there has been substantial compliance with statutory election procedures and the contested results relate to voter error, and there exists a reasonable expectation that the certified results expressed the will of

[Footnote continued on next page]

November 15, 2000, rejected the reasons and again announced that she would not accept the amended returns but rather would rely on the earlier certified totals for the four counties. The Secretary further stated that after she received the certified returns of the overseas absentee ballots from each county, she would certify the results of the presidential election on Saturday, November 18, 2000.

On Thursday, November 16, 2000, the Florida Democratic Party and Albert Gore filed a motion in Circuit Court of the Second Judicial Circuit in Leon County, Florida, seeking to compel the Secretary to accept amended returns. After conducting a hearing, the court denied relief in a brief order dated Friday, November 17, 2000.[6] That day, both the Democratic

[Footnote continued from previous page]

the voters. *Beckstrom. Volusia County Canvassing Bd.*, 707 So. 2d 720 (Fla. 1998).

2. Where there exists a ballot that may be confusing because of the alignment and location of the candidates' names, but is otherwise in substantial compliance with the election laws. *Nelson v. Robinson*, 301 So. 2d 508, 511 (Fla. 2d DCA 1974) ("[M]ere confusion does not amount to an impediment to the voters' free choice if reasonable time and study will sort it out.").

3. Where there is nothing "more than a mere possibility that the outcome of the election would have been effected." *Broward County Canvassing Bd. v. Hogan*, 607 So. 2d 508, 510 (Fla. 4th DCA 1992).

Letter from Katherine Harris to Palm Beach County Canvassing Board (Nov. 15, 2000).

[6] The court's order reads in part:

On the limited evidence presented, it appears that the Secretary has exercised her reasoned judgment to

[Footnote continued on next page]

Party and Gore appealed to the First District Court of Appeal, which consolidated the appeals with the Volusia Board's appeal already pending there, and certified both of the underlying trial court orders to this Court based on the Court's "pass-through" jurisdiction.[7] By orders dated Friday, November 17, 2000, this Court accepted jurisdiction, set an expedited briefing schedule, and enjoined the Secretary and the Elections Canvassing Commission (Commission) from certifying the results of the presidential election until further order of this Court.[8]

II. GUIDING PRINCIPLES

Twenty-five years ago, this Court commented that the will of the people, not a hyper-technical reliance upon statutory provisions, should be our guiding principle in election cases:

[Footnote continued from previous page]

> determine what relevant factors and criteria should be considered, applied them to the facts and circumstances pertinent to the individual counties involved, and made her decision. My order requires nothing more.

McDermott v. Harris, No. 00-2700, unpublished order at 2 (Fla. 2d Cir. Ct. Nov. 17, 2000).

[7] *See* Art. V, § 3(b)(5), Fla. Const. ("[The Court may] review any order or judgment of a trial court certified by the district court of appeal in which an appeal is pending to be of great public importance . . . and certified to require immediate resolution by the supreme court.").

[8] Subsequently, the Volusia Board moved to voluntarily dismiss its appeal in this Court. The Court granted the motion, but indicated that the case style would remain the same and that Gore and the Palm Beach Board "would continue as intervenors/appellants in this action."

> [T]he real parties in interest here, not in the legal sense but in realistic terms, are the voters. They are possessed of the ultimate interest and it is they whom we must give primary consideration. The contestants have direct interests certainly, but the office they seek is one of high public service and of upmost importance to the people, thus subordinating their interest to that of the people. Ours is a government of, by and for the people. Our federal and state constitutions guarantee the right of the people to take an active part in the process of that government, which for most of our citizens means participation via the election process. *The right to vote is the right to participate; it is also the right to speak, but more importantly the right to be heard.* We must tread carefully on that right or we risk the unnecessary and unjustified muting of the public voice. By refusing to recognize an otherwise valid exercise of the right of a citizen to vote for the sake of sacred, unyielding adherence to statutory scripture, we would in effect nullify that right.

Boardman v. Esteva, 323 So. 2d 259, 263 (Fla. 1975) (emphasis added). We consistently have adhered to the principle that the will of the people is the paramount consideration.[9] Our goal today remains the

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[9] *See State ex rel.Chappell v. Martinez*, 536 So. 2d 1007, 1009 (Fla. 1988) (holding that disenfranchisement of voters is not proper where there has been substantial compliance with the election statute and the intent of voter can be ascertained); *Beckstrom v. Volusia County Canvassing Bd.*, 707 So. 2d 720, 726 (Fla. 1998) (holding that courts should not frustrate will of voters if that will can be determined).

same as it was a quarter of a century ago, i.e., to reach the result that reflects the will of the voters, whatever that might be. This fundamental principle, and our traditional rules of statutory construction, guide our decision today.

III. ISSUES

The questions before this Court include the following: Under what circumstances may a Board authorize a countywide manual recount pursuant to section 102.166(5); must the Secretary and Commission accept such recounts when the returns are certified and submitted by the Board after the seven day deadline set forth in sections 102.111 and 102.112?[10]

IV. LEGAL OPINION OF THE DIVISION OF ELECTIONS

The first issue this Court must resolve is whether a County Board may conduct a countywide manual recount where it determines there is an error in vote tabulation that could affect the outcome of the election. Here, the Division issued opinion DE 00-13, which construed the language "error in vote tabulation" to exclude the situation where a discrepancy between the original machine return and sample manual recount is due to the manner in which a ballot has been marked or punched.

Florida courts generally will defer to an agency's interpretation of statutes and rules the agency is charged

[10] Neither party has raised as an issue on appeal the constitutionality of Florida's election laws.

with implementing and enforcing.[11] Florida courts, however, will not defer to an agency's opinion that is contrary to law.[12] We conclude that the Division's advisory opinion regarding vote tabulation is contrary to law because it contravenes the plain meaning of section 102.166(5).

Pursuant to section 102.166(4)(a), a candidate who appears on a ballot, a political committee that supports or opposes an issue that appears on a ballot, or a political party whose candidate's name appeared on the ballot may file a written request with the County Board for a manual recount. This request must be filed with the Board before the Board certifies the election results or within seventy-two hours after the election, whichever occurs later.[13] Upon filing the written request for a manual recount, the canvassing board may authorize a manual recount.[14] The decision whether to conduct a manual recount is vested in the sound discretion of the Board.[15] If the canvassing board decides to authorize the manual recount, the recount must include at least three precincts and at least one percent of the total votes cast for each candidate or issue, with the person who requested the recount choosing the precincts to be recounted.[16] If the manual

[11] *See Donato v. American Tel. & Tel.Co.*, 767 So. 2d 1146, 1153 (Fla. 2000); *Smith v. Crawford*, 645 So. 2d 513, 521 (Fla. 1st DCA 1994).

[12] *See Donato*, 767 So. 2d at 1153; *Nikolits v. Nicosia*, 682 So. 2d 663, 666 (Fla. 4th DCA 1996).

[13] § 102.166(4)(b), Fla. Stat. (2000).

[14] § 102.166(4)(c), Fla. Stat. (2000).

[15] *See Broward County Canvassing Bd. v. Hogan*, 607 So. 2d 508, 510 (Fla. 4th DCA 1992).

[16] *See* § 102.166(4)(d), Fla. Stat. (2000).

recount indicates an "error in the vote tabulation which could affect the outcome of the election," the county canvassing board "shall":

> (a) Correct the error and recount the remaining precincts with the vote tabulation system;
>
> (b) Request the Department of State to verify the tabulation software; *or*
>
> (c) Manually recount all ballots.

§ 102.166(5)(a)-(c), Fla. Stat. (2000) (emphasis added).

The issue in dispute here is the meaning of the phrase "error in the vote tabulation" found in section 102.166(5). The Division opines that an "error in the vote tabulation" only means a counting error resulting from incorrect election parameters or an error in the vote tabulating software. We disagree.

The plain language of section 102.166(5) refers to an error in the vote tabulation rather than the vote tabulation system. On its face, the statute does not include any words of limitation; rather, it provides a remedy for any type of mistake made in tabulating ballots. The Legislature has utilized the phrase "vote tabulation system" and "automatic tabulating equipment" in section 102.166 when it intended to refer to the voting system rather than the vote count. Equating "vote tabulation" with "vote tabulation system" obliterates the distinction created in section 102.166 by the Legislature.

Sections 101.5614(5) and (6) also support the proposition that the "error in vote tabulation" encompasses more than a mere determination of whether the vote tabulation system is functioning. Section 101.5614(5) provides that "[n]o vote shall be declared invalid or void if there is a clear indication of the intent of the voter as determined by the canvassing board."

Conversely, section 101.5614(6) provides that any vote in which the Board cannot discern the intent of the voter must be discarded. Taken together, these sections suggest that "error in the vote tabulation" includes errors in the failure of the voting machinery to read a ballot and not simply errors resulting from the voting machinery.

Moreover, section 102.141(4), which outlines the Board's responsibility in the event of a recount, states that the Board "shall examine the counters on the machines or the tabulation of the ballots cast in each precinct in which the office or issue appeared on the ballot and determine whether the returns correctly reflect the votes cast." § 102.141, Fla. Stat. (2000) (emphasis added). Therefore, an "error in the vote tabulation" includes a discrepancy between the number of votes determined by a voter tabulation system and the number of voters determined by a manual count of a sampling of precincts pursuant to section 102.166(4).

Although error cannot be completely eliminated in any tabulation of the ballots, our society has not yet gone so far as to place blind faith in machines. In almost all endeavors, including elections, humans routinely correct the errors of machines. For this very reason Florida law provides a human check on both the malfunction of tabulation equipment and error in failing to accurately count the ballots. Thus, we find that the Division's opinion DE 00-13 regarding the ability of county canvassing boards to authorize a manual recount is contrary to the plain language of the statute.

Having concluded that the county canvassing boards have the authority to order countywide manual recounts,

we must now determine whether the Commission[17] must accept a return after the seven-day deadline set forth in sections 102.111 and 102.112 under the circumstances presented.

V. THE APPLICABLE LAW

The abiding principle governing all election law in Florida is set forth in article I, section 1, Florida Constitution:

> SECTION 1. Political power.–All political power is inherent in the people. The enunciation herein of certain rights shall not be construed to deny or impair others retained by the people.

Art. I, § 1, Fla. Const. The constitution further provides that elections shall be regulated by law:

> SECTION 1. Regulation of elections.–All elections by the people shall be by direct and secret vote. General elections shall be determined by a plurality of votes cast. *Registration and elections shall, and political party functions may, be regulated by law*; however, the requirements for a candidate with no party affiliation or for a candidate of a minor party for placement of the candidate's name on

[17] The Commission is composed of the Secretary of State, the Director of the Division of Elections, and the Governor. *See* § 102.111, Fla. Stat. In this instance, Florida Governor Jeb Bush has removed himself from the Commission because his brother, Texas Governor George W. Bush, is the Republican candidate for President of the United States. Robert Crawford, Florida Commissioner on Agriculture, has been appointed to replace Florida Governor Jeb Bush. *See* § 102.111, Fla. Stat.

> the ballot shall be no greater than the requirements for a candidate of the party having the largest number of registered voters.

Art. VI, § 1, Fla. Const. (emphasis added).

The Florida Election Code ("Code"), contained in chapters 97–106, Florida Statutes (2000), sets forth specific criteria regulating elections. The Florida Secretary of State is the chief election officer of the state and is charged with general oversight of the election system.[18] The Supervisor of Elections ("Supervisor") in each county is an elected official[19] and is charged with appointing two Election Boards for each precinct within the county prior to an election.[20] Each Election Board is composed of inspectors and clerks,[21] all of whom must be residents of the county,[22] and is charged with conducting the voting in the election, counting the votes,[23] and certifying the results to the Supervisor[24] by noon of the day following the election.[25] The County Canvassing Board ("Canvassing Board" or "Board"), which is composed of the Supervisor, a county court judge, and the chair of the board of county commissioners,[26] then canvasses the returns

[18] § 97.012, Fla. Stat. (2000).

[19] § 98.015, Fla. Stat. (2000).

[20] § 102.012(1), Fla. Stat. (2000).

[21] § 102.012(1), Fla. Stat. (2000).

[22] § 102.012(2), Fla. Stat. (2000).

[23] § 102.012(4), Fla. Stat. (2000).

[24] § 102.071, Fla. Stat. (2000).

[25] § 102.141(3), Fla. Stat. (2000).

[26] § 102.141(1), Fla. Stat. (2000).

countywide,[27] reviews the certificates,[28] and transmits the returns for state and federal officers to the Florida Department of State ("Department") by 5:00 p.m. of the seventh day following the election.[29] No deadline is set for filing corrected, amended, or supplemental returns.

The Elections Canvassing Commission ("Canvassing Commission" or "Commission"), which is composed of the Governor, the Secretary of State, and the Director of the Division of Elections, canvasses the returns statewide, determines and declares who has been elected for each office, and issues a certificate of election for each office as soon as the results are compiled.[30] If any returns appear to be irregular or false and the Commission is unable to determine the true vote for a particular office, the Commission certifies that fact and does not include those returns in its canvass.[31] In determining the true vote, the Commission has no authority to look beyond the county's returns.[32] A candidate or elector can "protest" the returns of an election as being erroneous by filing a protest with the appropriate County Canvassing Board.[33] And finally, a

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[27] § 102.141(2), Fla. Stat. (2000).

[28] § 102.141 (3), Fla. Stat. (2000).

[29] §§ 102.111–.112, Fla. Stat. (2000).

[30] §§ 102.111, .121, Fla. Stat. (2000).

[31] § 102.131, Fla. Stat. (2000) ("If any returns shall appear to be irregular or false so that the Elections Canvassing Commission is unable to determine the true vote for any office . . . the commission shall so certify and shall not include the returns in its determination, canvass, and declaration.").

[32] § 102.131, Fla. Stat. (2000) ("The Elections Canvassing Commission in determining the true vote shall not have authority to look beyond the county returns.").

candidate, elector, or taxpayer can "contest" the certification of election results by filing a post-certification action in circuit court within certain time limits[34] and setting forth specific grounds.[35]

VI. STATUTORY AMBIGUITY

The provisions of the Code are ambiguous in two significant areas. First, the time frame for conducting a manual recount under section 102.166(4) is in conflict with the time frame for submitting county returns under sections 102.111 and 102.112. Second, the mandatory language in section 102.111 conflicts with the permissive language in 102.112.

[Footnote continued from previous page]

[33] § 102.166, Fla. Stat. (2000).

[34] *See* § 102.168(2), Fla. Stat. (2000) (explaining that the action must be filed within ten days after the last Board certifies its returns or within five days after the last Board certifies its returns following a protest).

[35] The grounds for contesting an election are set forth in section 102.168(3), Florida Statutes (2000):

> (a) Misconduct, fraud, or corruption . . . sufficient to change or place in doubt the result of the election.
>
> (b) Ineligibility of the successful candidate . . . .
>
> (c) Receipt of a number of illegal votes or rejection of a number of legal votes sufficient to change or place in doubt the result of the election.
>
> (d) Proof that any elector, election official or canvassing board member was given or offered a bribe . . . .
>
> (e) Any other cause or allegation which, if sustained, would show that a person other than the successful candidate was the person duly nominated or elected to the office in question.

A. The Recount Conflict

Section 102.166(1) states that "any candidate for nomination or election, or any elector qualified to vote in the election related to such candidacy shall have the right to protest the returns of the election as being erroneous by filing with the appropriate canvassing board a sworn written protest." The time period for filing a protest is "prior to the time the canvassing board certifies the results for the office being protested or within 5 days after midnight of the date the election is held, whichever is later.

Section 102.166(4)(a), the operative subsection in this case, further provides that, in addition to any protest, "any candidate whose name appeared on the ballot . . . or any political party whose candidates' names appeared on the ballot may file a written request with the county canvassing board for a manual recount" accompanied by the "reason that the manual recount is being requested." Section 102.166(4)(b) further provides that the written request may be made prior to the time the Board certifies the returns or within seventy-two hours after the election, whichever occurs later:[36]

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[36] As discussed in *Siegel v. Lepore*, 2000 WL 1687185 *6 (S.D. Fla. 2000):

> On its face, the manual recount provision does not limit candidates access to the ballot or interfere with voters' right to associate or vote. Instead the manual recount provision is intended to safeguard the integrity and reliability of the electoral process by providing a structural means of detecting and correcting clerical or electronic tabulating errors in the counting of election ballots. While discretionary in its application, the provision is not wholly standardless. Rather, the central purpose of the scheme, as

[Footnote continued on next page]

> (4)(a) Any candidate whose name appeared on the ballot, any political committee that supports or opposes an issue which appeared on the ballot, or any political party whose candidates' names appeared on the ballot may file a written request with the county canvassing board for a manual recount. The written request shall contain a statement of the reason the manual recount is being requested.
>
> *(b) Such request must be filed with the canvassing board prior to the time the canvassing board certifies the results for the office being protested or within 72 hours after midnight of the date the election was held, whichever occurs later.*

§ 102.166, Fla. Stat. (2000) (emphasis added).

A Board "may" authorize a manual recount[37] and such a recount must include at least three precincts and

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[Footnote continued from previous page]

> evidenced by its plain language, is to remedy 'an error in the vote tabulation which could affect the outcome of the election.' Fla. Stat. §102.166(5). In this pursuit, the provision strives to strengthen rather than dilute the right to vote by securing, as nearly as humanly possible, an accurate and true reflection of the will of the electorate. Notably, the four county canvassing boards [that were] challenged in this suit have reported various anomalies in the initial automated count and recount. The state manual recount provision therefore serves important governmental interests.

[37] The statute does not set forth any criteria for determining when a manual recount is appropriate. *See* § 102.166(4)(c), Fla. Stat.

[Footnote continued on next page]

at least one percent of the total votes cast for the candidate."[38] The following procedure then applies:

> (5) If the manual recount indicates an error in the vote tabulation which could affect the outcome of the election, the county canvassing board shall:
>
> (a) Correct the error and recount the remaining precincts with the vote tabulation system;
>
> (b) Request the Department of State to verify the tabulation software; or
>
> (c) Manually recount all ballots.
>
> (6) Any manual recount shall be open to the public.
>
> (7) Procedures for a manual recount are as follows:
>
> (a) The county canvassing board shall appoint as many counting teams of at least two electors as is necessary to manually recount the ballots. A counting team must have, when possible, members of at least two political parties. A candidate involved in the race shall not be a member of the counting team.
>
> (b) If a counting team is unable to determine a voter's intent in casting a ballot, the ballot shall be presented to the county canvassing board for it to determine the voter's intent.

[Footnote continued from previous page]

(2000) ("The county canvassing board may authorize a manual recount.").

[38] § 102.166(4)(d), Fla. Stat. (2000).

§ 102.166, Fla. Stat. (2000).

Under this scheme, a candidate can request a manual recount at any point prior to certification by the Board and such action can lead to a full recount of all the votes in the county. Although the Code sets no specific deadline by which a manual recount must be completed, logic dictates that the period of time required to complete a full manual recount may be substantial, particularly in a populous county, and may require several days. The protest provision thus conflicts with section 102.111 and 102.112, which state that the Boards "must" submit their returns to the Elections Canvassing Commission by 5:00 p.m. of the seventh day following the election or face penalties. For instance, if a party files a pre-certification protest on the sixth day following the election and requests a manual recount and the initial manual recount indicates that a full countywide recount is necessary, the recount procedure in most cases could not be completed by the deadline in sections 102.111 and 102.112, i.e., by 5:00 p.m. of the seventh day following the election.

B. The "Shall" and "May" Conflict

In addition to the conflict in the above statutes, sections 102.111 and 102.112 contain a dichotomy. Section 102.111, which sets forth general criteria governing the State Canvassing Commission, was enacted in 1951 as part of the Code and provides as follows:

> 102.111 Elections Canvassing Commission.–
>
> (1) Immediately after certification of any election by the county canvassing board, the results shall be forwarded to the Department of State concerning the election of any federal or state officer. The Governor, the Secretary of State, and the Director of the Division of

> Elections shall be the Elections Canvassing Commission. The Elections Canvassing Commission shall, as soon as the official results are compiled from all counties, certify the returns of the election and determine and declare who has been elected for each office. In the event that any member of the Elections Canvassing Commission is unavailable to certify the returns of any election, such member shall be replaced by a substitute member of the Cabinet as determined by the Director of the Division of Elections. *If the county returns are not received by the Department of State by 5 p.m. of the seventh day following an election, all missing counties shall be ignored*, and the results shown by the returns on file shall be certified.

§ 102.111, Fla. Stat. (2000) (emphasis added).

The Legislature in 1989 revised chapter 102 to include section 102.112, which provides that returns not received after a certain date "may" be ignored and that members of the County Board "shall" be fined:

> 102.112 Deadline for submission of county returns to the Department of State; penalties.–
>
> (1) The county canvassing board or a majority thereof shall file the county returns for the election of a federal or state officer with the Department of State immediately after the certification of the election results. Returns must be filed by 5 p.m. on the 7th day following the first primary and general election and by 3 p.m. on the 3rd day following the second primary. *If the returns are not received by the department by the time specified, such returns may be ignored* and the results on file at that time may be certified by the department.

> (2) The department shall fine each board member $200 for each day such returns are late, the fine to be paid only from the board member's personal funds. Such fines shall be deposited into the Election Campaign Financing Trust fund, created by s. 106.32.
>
> (3) Members of the county canvassing board may appeal such fines to the Florida Elections Commission, which shall adopt rules for such appeals.

§ 102.112, Fla. Stat. (2000) (emphasis added).

The above statutes conflict. Whereas section 102.111 is mandatory, section 102.112 is permissive. While it is clear that the Boards must submit returns by 5 p.m. of the seventh day following the election or face penalties, the circumstances under which penalties may be assessed are unclear.

VII. LEGISLATIVE INTENT

Legislative intent–as always–is the polestar that guides a court's inquiry into the provisions of the Florida Election Code.[39] Where the language of the Code is clear and amenable to a reasonable and logical interpretation, courts are without power to diverge from the intent of the Legislature as expressed in the plain language of the Code.[40] As noted above, however, chapter 102 is unclear concerning both the time limits

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[39] *See, e.g., Florida Birth-Related Neurological Injury Compensation Ass'n v. Florida Div. of Admin. Hearings*, 686 So. 2d 1349 (Fla. 1997).

[40] *See, e.g., Starr Tyme, Inc. v. Cohen*, 659 So. 2d 1064 (Fla. 1995).

for submitting the results of a manual recount and the penalties that may be assessed by the Secretary. In light of this ambiguity, the Court must resort to traditional rules of statutory construction in an effort to determine legislative intent.[41]

First, it is well-settled that where two statutory provisions are in conflict, the specific statute controls the general statute.[42] In the present case, whereas section 102.111 in its title and text addresses the general makeup and duties of the Elections Canvassing Commission, the statute only tangentially addresses the penalty for returns filed after the statutory date, noting that such returns "shall" be ignored by the Department. Section 102.112, on the other hand, directly addresses in its title and text both the "deadline" for submitting returns and the "penalties" for submitting returns after a certain date; the statute expressly states that such returns "may" be ignored and that dilatory Board members "shall" be fined. Based on the precision of the title and text, section 102.112 constitutes a specific penalty statute that defines both the deadline for filing returns and the penalties for filing returns thereafter and section 102.111 constitutes a non-specific statute in this regard. The specific statute controls the non-specific statute.

Second, it also is well-settled that when two statutes are in conflict, the more recently enacted statute controls the older statute.[43] In the present case, the provision in section 102.111 stating that the Department "shall" ignore returns was enacted in 1951 as part of the Code.

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[41] *See, e.g., Capers v. State*, 678 So. 2d 330 (Fla. 1996).

[42] *See, e.g.*, State ex rel.Johnson v. Vizzini, 227 So. 2d 205 (Fla. 1969).

[43] *See, e.g., McKendry v. State*, 641 So. 2d 45 (Fla. 1994).

On the other hand, the penalty provision in section 102.112 stating that the Department "may" ignore returns was enacted in 1989 as a revision to chapter 102. The more recently enacted provision may be viewed as the clearest and most recent expression of legislative intent.

Third, a statutory provision will not be construed in such a way that it renders meaningless or absurd any other statutory provision.[44] In the present case, section 102.112 contains a detailed provision authorizing the assessment of fines against members of a dilatory County Canvassing Board. The fines are personal and substantial, i.e., $200 for each day the returns are not received. If, as the Secretary asserts, the Department were required to ignore all returns received after the statutory date, the fine provision would be meaningless. For example, if a Board simply completed its count late and if the returns were going to be ignored in any event, what would be the point in submitting the returns? The Board would simply file no returns and avoid the fines. But, on the other hand, if the returns submitted after the statutory date would not be ignored, the Board would have good reason to submit the returns and accept the fines. The fines thus serve as an alternative penalty and are applicable only if the Department may count the returns.

Fourth, related statutory provisions must be read as a cohesive whole.[45] As stated in *Forsythe v. Longboat Key Beach Erosion Control Dist.*, 604 So. 2d 452, 455 (Fla. 1992), "all parts of a statute must be read together in order to achieve a consistent whole. Where possible,

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[44] *See, e.g., Amente v. Newman*, 653 So. 2d 1030 (Fla. 1995).

[45] *See, e.g., Sun Ins. Office, Ltd. v. Clay*, 133 So. 2d 735 (Fla. 1961).

courts must give effect to all statutory provisions and construe related statutory provisions in harmony with another." In this regard we consider the provisions of section 102.166 and 102.168.

Section 102.166 states that a candidate, political committee, or political party may request a manual recount any time before the County Canvassing Board certifies the results to the Department and, if the initial manual recount indicates a significant error, the Board "shall" conduct a countywide manual recount in certain cases. Thus, if a protest is filed on the sixth day following an election and a full manual recount is required, the Board, through no fault of its own, will be unable to submit its returns to the Department by 5:00 p.m. on the seventh day following the election. In such a case, if the mandatory provision in section 102.111 were given effect, the votes of the county would be ignored for the simple reason that the Board was following the dictates of a different section of the Code. The Legislature could not have intended to penalize County Canvassing Boards for following the dictates of the Code.

And finally, when the Legislature enacted the Code in 1951, it envisioned that all votes cast during a particular election, including absentee ballots, would be submitted to the Department at one time and would be treated in a uniform fashion. Section 97.012(1) states that it is the Secretary's responsibility to "[o]btain and maintain uniformity in the application, operation, and interpretation of the election laws." Chapter 101 provides that all votes, including absentee ballots, must be received by the Supervisor no later than 7 p.m. on the day of the election. Section 101.68(2)(d) expressly states that "[t]he votes on absentee ballots shall be included in the total vote of the county." Chapter 102 requires that the Board submit the returns by 5 p.m. on the seventh day following the election.

The Legislature thus envisioned that when returns are submitted to the Department, the returns "shall" embrace all the votes in the county, including absentee ballots. This, of course, is not possible because our state statutory scheme has been superseded by federal law governing overseas voters;[46] overseas ballots must be counted if received no later than ten days following the election (i.e., the ballots do *not* have to be received by 7 p.m. of the day of the election, as provided by state law).[47] In light of the fact that overseas ballots cannot be counted until after the seven day deadline has expired, the mandatory language in section 102.111 has been supplanted by the permissive language of section 102.112.

Further, although county returns must be received by 5 p.m. on the seventh day following an election, the "official results" that are to be compiled in order to certify the returns and declare who has been elected must be construed in pari materia with section

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[46] According to the Secretary, this matter is governed by consent decree with the federal government.

[47] *See* Fla. Admin. Code R.1S-2.013 (1998), which provides in relevant part:

> (7) With respect to the presidential preference primary and the general election, any absentee ballot cast for a federal office by an overseas elector which is postmarked or signed and dated no later than the date of the Federal election shall be counted if received no later than 10 days from the date of the Federal election so long as such absentee ballot is otherwise proper. Overseas electors shall be informed by the supervisors of elections of the provisions of this rule, i.e., the ten day extension provision for the presidential preference primary and the general election, and the provision for voting for the second primary.

101.5614(8), which specifies that "write-in, absentee *and manually counted results* shall constitute the official return of the election." (Emphasis added.)

Under this statutory scheme, the County Canvassing Boards are required to submit their returns to the Department by 5 p.m. of the seventh day following the election. The statutes make no provision for exceptions following a manual recount. If a Board fails to meet the deadline, the Secretary is not required to ignore the county's returns but rather is permitted to ignore the returns within the parameters of this statutory scheme. To determine the circumstances under which the Secretary may lawfully ignore returns filed pursuant to the provisions of section 102.166 for a manual recount , it is necessary to examine the interplay between our statutory and constitutional law at both the state and federal levels.

VIII. THE RIGHT TO VOTE

The text of our Florida Constitution begins with a Declaration of Rights, a series of rights so basic that the founders accorded them a place of special privilege.[48] The Court long ago noted the venerable role the Declaration plays in our tripartite system of government in Florida:

> It is significant that our Constitution thus commences by specifying those things which the state government must not do, before specifying certain things that it may do. These Declarations of Rights . . . have cost much, and breathe the spirit of that sturdy and self-reliant philosophy of individualism which underlies and

[48] *Traylor v. State*, 596 So. 2d 957, 963 (Fla. 1992).

> supports our entire system of government. No race of hothouse plants could ever have produced and compelled the recognition of such a stalwart set of basic principles, and no such race can preserve them. They say to arbitrary and autocratic power, from whatever official quarter it may advance to invade these vital rights of personal liberty and private property, "Thus far shalt thou come, but no farther."

State v. City of Stuart, 120 So. 335, 347 (Fla. 1929). Courts must attend with special vigilance whenever the Declaration of Rights is in issue.

The right of suffrage is the preeminent right contained in the Declaration of Rights, for without this basic freedom all others would be diminished. The importance of this right was acknowledged by the authors of the Constitution, who placed it first in the Declaration. The very first words in the body of the constitution are as follows:

> SECTION 1. Political power.–*All political power is inherent in the people.* The enunciation herein of certain rights shall not be construed to deny or impair others retained by the people.

Art. I., § 1, Fla. Const. (emphasis added). The framers thus began the constitution with a declaration that all political power inheres in the people and only they, the people, may decide how and when that power may be given up.[49]

[49] *See* Talbot D'Alemberte, *Commentary*, 25A Fla. Stat. Ann., Art. I, § 1, Fla. Const. (West 1991).

To the extent that the Legislature may enact laws regulating the electoral process, those laws are valid only if they impose no "unreasonable or unnecessary" restraints on the right of suffrage:

> The declaration of rights expressly states that "all political power is inherent in the people." Article I, Section 1, Florida Constitution. The right of the people to select their own officers is their sovereign right, and the rule is against imposing unnecessary and unreasonable [restraints on that right]. . . . *Unreasonable or unnecessary* restraints on the elective process are prohibited.

Treiman v. Malmquist, 342 So. 2d 972, 975 (Fla. 1977) (emphasis added).[50] Because election laws are intended to facilitate the right of suffrage, such laws must be liberally construed in favor of the citizens' right to vote:

> Generally, the courts, in construing statutes relating to elections, hold that the same should receive a liberal construction in favor of the citizen whose right to vote they tend to restrict and in so doing to prevent disfranchisement of legal voters and the intention of the voters should prevail when counting ballots . . . . It is the intention of the law to obtain an honest expression of the will or desire of the voter.

[50] *See also Pasco v. Heggen*, 314 So. 2d 1, 3 (Fla. 1975) ("We have also stated that only unreasonable or unnecessary restraints on the elective process are prohibited.").

State ex rel. Carpenter v. Barber, 198 So. 49, 51 (Fla. 1940).[51] Courts must not lose sight of the fundamental purpose of election laws: The laws are intended to facilitate and safeguard the right of each voter to express his or her will in the context of our representative democracy.[52] Technical statutory requirements must not be exalted over the substance of this right.[53]

Based on the foregoing, we conclude that the authority of the Florida Secretary of State to ignore amended returns submitted by a County Canvassing Board may be lawfully exercised only under limited circumstances as we set forth in this opinion. The clear import of the penalty provision of section 102.112 is to deter Boards from engaging in dilatory conduct contrary to statutory authority that results in the late certification of a county's returns. This deterrent purpose is achieved by the fines in section 102.112, which are substantial and personal and are levied on each member of a Board. The alternative penalty, i.e., ignoring the county's returns, punishes not the Board members themselves but

[51] *See also State ex rel. Whitley v. Rinehart*, 192 So. 819, 823 (Fla. 1939) ("Election laws should be construed liberally in favor of the right to vote . . . .").

[52] *See, e.g., State ex rel. Landis v. Dyer*, 148 So. 201, 203 (Fla. 1933) ("The right to vote, though not inherent, is a constitutional right in this state. The Legislature may impose reasonable rules and regulations for its governance, but it cannot under the guise of such regulation unduly subvest or restrain this right.").

[53] *See, e.g., Boardman v. Esteva*, 323 So. 2d 259, 269 (Fla. 1975) ("In summary, we hold that the primary consideration in an election contest is whether the will of the people has been effected.").

rather the county's electors. for it in effect disenfranchises them.[54]

Ignoring the county's returns is a drastic measure and is appropriate only if the returns are submitted to the Department so late that their inclusion will compromise the integrity of the electoral process in either of two ways: (1) by precluding a candidate, elector, or taxpayer from contesting the certification of an election pursuant to section 102.168; or (2) by precluding Florida voters from participating fully in the federal electoral process."[55] In either case, the Secretary must explain to the Board her reason for ignoring the returns and her action must be adequately supported by the law. To disenfranchise electors in an effort to deter Board members, as the Secretary in the present case proposes, is unreasonable, unnecessary, and violates longstanding law.

Allowing the manual recounts to proceed in an expeditious manner, rather than imposing an arbitrary seven-day deadline, is consistent not only with the statutory scheme but with prior United States Supreme Court pronouncements:

> Indiana has found, along with many other States, that one procedure necessary to guard against irregularity and error in the tabulation of votes is the availability of a recount. Despite the fact that a certificate of election may be issued to the leading candidate within 30 days

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[54] *Cf. Boardman v. Esteva*, 323 So. 2d 259, 268-69 (Fla. 1975) ("When the voters have done all that the statute has required them to do, they will not be disfranchised solely on the basis of the failure of the election officials to observe directory statutory instructions.").

[55] *See* 3 U.S.C. §§ 1-10 (1994).

> after the election, the results are not final if a candidate's option to compel a recount is exercised. A recount is an integral part of the Indiana electoral process and is within the ambit of the broad powers delegated to the States by Art. I, s 4.

Roudebush v. Hartke, 405 U.S. 15, 25 (1972)(footnotes omitted).

In addition, an accurate vote count is one of the essential foundations of our democracy. The words of the Supreme Court of Illinois are particularly apt in this case:

> The purpose of our election laws is to obtain a correct expression of the intent of the voters. Our courts have repeatedly held that, where the intention of the voter can be ascertained with reasonable certainty from his ballot, that intention will be given effect even though the ballot is not strictly in conformity with the law. . . . The legislature authorized the use of electronic tabulating equipment to expedite the tabulating process and to eliminate the possibility of human error in the counting process, not to create a technical obstruction which defeats the rights of qualified voters. This court should not, under the appearance of enforcing the election laws, defeat the very object which those law are intended to achieve. To invalidate a ballot which clearly reflects the voter's intent, simply because a machine cannot read it, would subordinate substance to form and promote the means at the expense of the end.
>
> The voters here did everything which the Election Code requires when they punched the appropriate chad with the stylus. These voters

> should not be disfranchised where their intent may be ascertained with reasonable certainty, simply because the chad they punched did not completely dislodge from the ballot. Such a failure may be attributable to the fault of the election authorities, for failing to provide properly perforated paper, or it may be the result of the voter's disability or inadvertence. Whatever the reason, where the intention of the voter can be fairly and satisfactorily ascertained, that intention should be given effect.

Pullen v. Milligan, 561 N.E.2d 585, 611 (Ill. 1990) (citations omitted).

IX. THE PRESENT CASE

The trial court below properly concluded that the County Canvassing Boards are required to submit their returns to the Department by 5:00 p.m. of the seventh day following the election and that the Department is not required to ignore the amended returns but rather may count them. The court, however, erred in holding that the Secretary acted within her discretion in prematurely rejecting any amended returns that would be the result of ongoing manual recounts. The Secretary's rationale for rejecting the Board's returns was as follows:

> The Board has not alleged any facts or circumstances that suggest the existence of voter fraud. The Board has not alleged any facts or circumstances that suggest that there has been substantial noncompliance with the state's statutory election procedures, coupled with reasonable doubt as to whether the certified results expressed the will of the voters. The Board has not alleged any facts or circumstances that suggest that Palm Beach County has been unable to comply with its election duties due to an act of God, or other

> extenuating circumstances that are beyond its control. The Board has alleged the *possibility* that the results of the manual recount *could* affect the outcome of the election if certain results obtain. However, absent an assertion that there has been substantial noncompliance with the law, I do not believe that the *possibility* of affecting the outcome of the election is enough to justify ignoring the statutory deadline. Furthermore, I find that the facts and circumstances alleged, standing alone, do not rise to the level of extenuating circumstances that justify a decision on my part to ignore the statutory deadline imposed by the Florida Legislature.

Letter from Katherine Harris to Palm Beach Canvassing Board (Nov. 15, 2000)(emphasis added).

We conclude that, consistent with the Florida election scheme, the Secretary may reject a Board's amended returns only if the returns are submitted so late that their inclusion will preclude a candidate from contesting the certification or preclude Florida's voters from participating fully in the federal electoral process. The Secretary in the present case has made no claim that either of these conditions apply at this point in time.

The above analysis is consistent with *State ex rel. Chappell v. Martinez*, 536 So. 2d 1007 (Fla. 1988), wherein the Court addressed a comparable recount issue. There, the total votes cast for each of two candidates for a seat in the United State House of Representatives were separated by less than one-half of one percent; the county conducted a mandatory recount; the Board's certification of results was not received by the Department until two days after the deadline, although the Board had telephoned the results to the Department prior to the deadline; and the unsuccessful candidate sued to prevent the Department from counting the late

votes. The Court concluded that the will of the electors supersedes any technical statutory requirements:

> [T]he electorate's effecting its will through its balloting, not the hypertechnical compliance with statutes, is the object of holding an election. "There is no magic in the statutory requirements. If they are complied with to the extent that the duly responsible election officials can ascertain that the electors whose votes are being canvassed are qualified and registered to vote, and that they do so in a proper manner, then who can be heard to complain the statute has not been literally and absolutely complied with?"

Chappell, 536 So. 2d at 1008-09 (quoting *Boardman v. Esteva*, 323 So. 2d 259, 267 (Fla. 1975)).

X. CONCLUSION

According to the legislative intent evinced in the Florida Election Code, the permissive language of section 102.112 supersedes the mandatory language of section 102.111. The statutory fines set forth in section 102.112 offer strong incentive to County Canvassing Boards to submit their returns in a timely fashion. However, when a Board certifies its returns after the seven-day period because the Board is acting in conformity with other provisions of the Code or with administrative rules or for other good cause, the Secretary may impose no fines. It is unlikely that the Legislature would have intended to punish a Board for complying with the dictates of the Code or some other law.

Because the right to vote is the pre-eminent right in the Declaration of Rights of the Florida Constitution, the circumstances under which the Secretary may exercise her authority to ignore a county's returns filed after the

initial statutory date are limited. The Secretary may ignore such returns only if their inclusion will compromise the integrity of the electoral process in either of two ways: (1) by precluding a candidate, elector, or taxpayer from contesting the certification of election pursuant to section 102.168; or (2) by precluding Florida voters from participating fully in the federal electoral process. In either such case, this drastic penalty must be both reasonable and necessary. But to allow the Secretary to summarily disenfranchise innocent electors in an effort to punish dilatory Board members, as she proposes in the present case, misses the constitutional mark. The constitution eschews punishment by proxy.

As explained above, the Florida Election Code must be construed as a whole. Section 102.166 governs manual recounts and appears to conflict with sections 102.111 and 102.112, which set a seven day deadline by which County Boards must submit their returns. Further, section 102.111, which provides that the Secretary "shall" ignore late returns, conflicts with section 102.112, which provides that the Secretary "may" ignore late returns. In the present case, we have used traditional rules of statutory construction to resolve these ambiguities to the extent necessary to address the issues presented here. We decline to rule more expansively, for to do so would result in this Court substantially rewriting the Code. We leave that matter to the sound discretion of the body best equipped to address it -- the Legislature.

Because of the unique circumstances and extraordinary importance of the present case, wherein the Florida Attorney General and the Florida Secretary of State have issued conflicting advisory opinions concerning the propriety of conducting manual recounts, and because of our reluctance to rewrite the Florida Election Code, we conclude that we must invoke the equitable powers of this Court to fashion a remedy that

will allow a fair and expeditious resolution of the questions presented here.[56]

Accordingly, in order to allow maximum time for contests pursuant to section 102.168, amended certifications must be filed with the Elections Canvassing Commission by 5 p.m. on Sunday, November 26, 2000 and the Secretary of State and the Elections Canvassing Commission shall accept any such amended certifications received by 5 p.m. on Sunday, November 26, 2000, provided that the office of the Secretary of State, Division of Elections is open in order to allow receipt thereof. If the office is not open for this special purpose on Sunday, November 26, 2000, then any amended certifications shall be accepted until 9 a.m. on Monday, November 27, 2000. The stay order entered on November 17, 2000, by this Court shall remain in effect until the expiration of the time for accepting amended certifications set forth in this opinion. The certificates made and signed by the Elections Canvassing Commission pursuant to section 102.121 shall include the amended returns accepted through the dates set forth in this opinion.

It is so ordered. No motion for rehearing will be allowed.

WELLS, C.J., and SHAW, HARDING, ANSTEAD, PARIENTE, LEWIS and QUINCE, JJ., concur.

* * * * *

[56] At oral argument, we inquired as to whether the presidential candidates were interested in our consideration of a reopening of the opportunity to request recounts in any additional counties. Neither candidate requested such an opportunity.

APPENDIX B

SUPREME COURT OF FLORIDA

Friday, November 17, 2000 – CORRECTED ORDER

Case Nos.: SC00-2346, SC00-2348 & SC00-2349

PALM BEACH COUNTY CANVASSING BOARD,
Petitioner,
vs.
KATHERINE HARRIS, ETC., ET AL.
Respondents.

VOLUSIA COUNTY CANVASSING BOARD, ET AL.,
Appellants,
vs.
KATHERINE HARRIS, ETC., ET AL.
Appellees.

FLORIDA DEMOCRATIC PARTY,
Appellant,
vs.
KATHERINE HARRIS, ETC., ET AL.
Appellees.

STAY ORDER

In order to maintain the status quo, the Court, on its own motion, enjoins the Respondent, Secretary of State and Respondent, the Elections Canvassing Commission

from certifying the results of the November 7, 2000, presidential election, until further order of this Court. It is NOT the intent of this Order to stop the counting and conveying to the Secretary of State the results of absentee ballots or any other ballots.

WELLS, C.J., SHAW, HARDING, ANSTEAD, PARIENTE, LEWIS and QUINCE, JJ., concur.

A True Copy
Test:

/s/
Thomas D. Hall
Clerk, Supreme Court

APPENDIX C

SUPREME COURT OF FLORIDA

Thursday, November 16, 2000

Case No.: SC00-2346

PALM BEACH COUNTY CANVASSING BOARD,
Petitioner,
vs.
KATHERINE HARRIS, ETC., ET AL.
Respondents.

We enter the present interim order in this matter. We have considered the Petition and it appears that the relief sought on the question of whether the Canvassing Board may conduct a manual recount of the votes cast for President and Vice President has been answered in the affirmative by the Circuit Courts of Leon and Palm Beach County. At present, this is binding legal authority on this issue and there is no legal impediment to the recounts continuing. Thus, Petitioners are authorized to proceed with the manual recount.

WELLS, C.J., SHAW, HARDING, ANSTEAD, PARIENTE, LEWIS and QUINCE, JJ., concur.

A True Copy
Test:

/s/
Thomas D. Hall
Clerk, Supreme Court

APPENDIX D

**IN THE CIRCUIT COURT OF
THE SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, FLORIDA**

MICHAEL McDERMOTT, ANN McFALL and PATRICIA NORTHEY, as the CANVASSING BOARD FOR VOLUSIA COUNTY, FLORIDA, CANVASSING BOARD FOR PALM BEACH COUNTY, FLORIDA, DEMOCRATIC PARTY OF FLORIDA, and VICE PRESIDENT ALBERT GORE

Plaintiffs, CASE NO: 00-2700

vs.

HONORABLE KATHERINE HARRIS, as Secretary of State, State of Florida, and HONORABLE KATHERINE HARRIS, HONORABLE BOB CRAWFORD and HONORABLE LAURENCE C. ROBERTS, as the Elections Canvassing Commission, GOVERNOR GEORGE W. BUSH, and MATT BUTLER,

Defendants.

_____/

ORDER DENYING EMERGENCY MOTION TO COMPEL COMPLIANCE WITH AND FOR ENFORCEMENT OF INJUNCTION

The limited issue before me on this Motion is whether the Secretary of State has violated my Order of November 14, 2000. The Plaintiffs assert that she has

acted arbitrarily in deciding to ignore amended returns from counties conducting manual recounts. I disagree.

As noted in my previous Order, Florida law grants to the Secretary, as the Chief Elections Officer, broad discretionary authority to accept or reject late filed returns. The purpose and intent of my Order was to insure that she in fact properly exercised her discretion, rather than automatically reject returns that came in after the statutory deadline.

On the limited evidence presented, it appears that the Secretary has exercised her reasoned judgment to determine what relevant factors and criteria should be considered, applied them to the facts and circumstances pertinent to the individual counties involved, and made her decision. My Order requires nothing more.

Accordingly, it is

ORDERED AND ADJUDGED that the Motion is hereby denied.

DONE AND ORDERED in Chambers at Tallahassee, Leon County, Florida, this 17th day of November, 2000.

/s/
TERRY P. LEWIS, Circuit Judge

APPENDIX E

**IN THE CIRCUIT COURT OF
THE SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, FLORIDA**

MICHAEL McDERMOTT, ANN McFALL and PATRICIA NORTHEY, as the CANVASSING BOARD FOR VOLUSIA COUNTY, FLORIDA, CANVASSING BOARD FOR PALM BEACH COUNTY, FLORIDA, DEMOCRATIC PARTY OF FLORIDA, and VICE PRESIDENT ALBERT GORE

Plaintiffs, CASE NO: 00-2700

vs.

HONORABLE KATHERINE HARRIS, as Secretary of State, State of Florida, and HONORABLE KATHERINE HARRIS, HONORABLE BOB CRAWFORD and HONORABLE LAURENCE C. ROBERTS, as the Elections Canvassing Commission, GOVERNOR GEORGE W. BUSH, and MATT BUTLER,

Defendants.

_____/

ORDER GRANTING IN PART AND DENYING IN PART MOTION FOR TEMPORARY INJUNCTION

This declaratory judgment action is before me on the Motion of the Canvassing Board for Volusia County for a temporary injunction against the Secretary of State

and the Elections Canvassing Commission. By Motion and agreement of the parties, the Florida Democratic Party, Candidate Al Gore, and the Canvassing Board of Palm Beach County have intervened as Party Plaintiffs, and Candidate George W. Bush and Elector Matt Butler have intervened as Party Defendants.

The heart of the issue raised by the Motion is this: Section 102.166, *Florida Statutes*, contemplates that upon request a county canvassing board may authorize a manual recount of votes cast in an election. Both Volusia and Palm Beach Counties have so authorized, and are in the process of conducting, a manual recount. The Boards are concerned that the manual recounts may not be completed by 5:00 p.m. today, November 14, 2000, which is the deadline imposed upon them by Section 102.112, *Florida Statutes*, to certify and report the election returns to the Secretary of State. This Section provides that if the returns are not received by the deadline, such returns *may* be ignored by the Secretary in her certification of results statewide.

The Plaintiffs insist that the Secretary of State *must* consider the certified results from Volusia and Palm Beach Counties, even if they are filed late, if they are still engaged in the manual recount of the votes. The Secretary of State insists that, absent an Act of God such as a hurricane, any returns not received by the statutory deadline *will not* be counted in the statewide tabulations and certification of the election results. For the reasons set forth below, I find that the County Canvassing Boards must certify and file what election returns they have by the statutory deadline of 5:00 p.m. of November 14, 2000, with due notification to the Secretary of State of any pending manual recount, and may thereafter file supplemental or corrective returns. The Secretary of State may ignore such late filed returns, but may not do so arbitrarily, rather, only by the proper exercise of discretion after consideration of all appropriate facts and circumstances.

The Secretary of State takes the position that the law requires the County Canvassing Boards to certify and report the results of elections in their counties no later than 5:00 p.m. November 14, 2000, that there are no exceptions to this mandate, and that the Secretary is likewise required by law to ignore any untimely received returns unless the untimeliness is caused by a hurricane or other Act of God.[1] I give great deference to the interpretation by the Secretary of the election laws, and I agree that the Canvassing Boards must file their returns by 5:00 p.m. today. I disagree, however, that the Secretary is required to ignore any late filed returns absent an Act of God. There are several reasons for my conclusion:

1. A reading of the entire Election Code suggests a legislative intent to balance the desire for accuracy with the desire for finality. By concentrating on the deadline imposed by Section 102.112, *Florida Statutes*, the Secretary has come down hard on the side of finality. This interpretation ignores, however, Section 102.166, *Florida Statutes*, which gives to the County Canvassing Boards the authority to authorize a manual recount. A request for such recount may be made within three days of the election. If a manual recount of at least three precincts and at least one percent (1%) of the total votes indicates an error in vote tabulation which could effect the outcome of the election, the Canvassing Board shall either (a) correct the error and recount the remaining precincts with the vote tabulation system, (b) request the Department of State to verify the tabulation software, or (3) manually recount all ballots.

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[1] The Secretary of State acknowledges that Section 102.112, rather than Section 102.111, *Florida Statutes*, prevails as to the question of the whether the Department has any discretion in whether to ignore late filed results.

Depending on when a request is made and then acted upon, it is easy to imagine a situation where a manual recount could be lawfully authorized, commenced, but not completed within seven days of the election. The Secretary of State responds that the authority to authorize a manual recount is subject to the requirement that such recount be done and the results certified no later than the deadline imposed by Section 102.112, *Florida Statutes*. This would mean, however, that only in sparsely populated counties could a Canvassing Board safely exercise what the Legislature has clearly intended to be an option where the Board has a real question as to the accuracy of a vote.

2. Section 102.166, *Florida Statutes*, gives any candidate, or qualified elector, the right to protest the returns of a County Canvassing Board by filing a sworn written protest, and that protest may be filed within five (5) days of the election, or any time before the Canvassing Board certifies the results, *whichever occurs later*. This suggests that the Canvassing Board might be in a position of having to address a protest of its returns the day before, or hours before, it was to certify the results pursuant to the deadline in Section 102.112, *Florida Statutes*, thus making it impossible to correct any error before the deadline. It is unlikely that the Legislature would give the right to protest returns, but make it meaningless because it could not be acted upon in time.

3. Section 102.168 provides for the contesting of an election by an unsuccessful candidate or a qualified elector, by filing a complaint in Circuit Court within ten (10) days after the Canvassing Board certifies the result of an election or within five (5) days after the Canvassing Board certifies the results of an election following a protest pursuant to Section 102.166(1), *Florida Statutes, whichever occurs later*. This provision suggests that certifications of the results in an election

might occur later than usual if there is a protest of the returns.

4. The Secretary of State acknowledges that, by consent decree with the Federal Government, the absentee ballots of overseas electors must be counted if received up to ten (10) days after the election (three days beyond the deadline imposed by Section 102.112, *Florida Statutes*). The County Canvassing Board can not report final returns, nor can the Election Canvassing Commission determine a winner of the election until all of these overseas absentee ballots are counted. The Secretary explains this anomaly by inferring a requirement to do one certification of results seven (7) days after the election and a "supplemental certification" ten (10) days after the election. There is, however, no statutory provision that provides for such a supplemental certification. Instead, Section 102.111, *Florida Statutes*, which deals specifically with the duty of the Elections Canvassing Commission, requires the Commission to, "as soon as the official results are compiled from all Counties, certify the returns of the election and *determine and declare who has been selected for each office*. . . ."

5. As noted earlier, the Secretary acknowledges that Section 102.112, *Florida Statutes*, uses the discretionary term "may", instead of the mandatory term "shall" as to whether late returns are to be ignored by the Secretary in certifying the results of the election. That the Secretary *may* ignore late filed returns necessarily means that the Secretary *does not have to* ignore such returns. It is, as the Secretary acknowledges, within her discretion.

To determine ahead of time that such returns *will* be ignored, however, unless caused by some Act of God, is not the exercise of discretion. It is the abdication of that discretion. An Act of God has long been considered to excuse even the most mandatory of requirements. Rather, the exercise of discretion, by its nature,

contemplates a decision based upon a weighing and consideration of all attendant facts and circumstances.

The Florida Supreme Court has stated that "substantial compliance" is sufficient to comply with such mandatory filing deadlines. See *Chappel v. Martinez*, 536 So. 2d 1007 (Fla. 1988). If the returns are received from a County at 5:05 p.m. on November 14, 2000, should the results be ignored? What about fifteen minutes? An hour? What if there was an electrical power outage? Some other malfunction of the transmitting equipment? More particularly related to this case, when was the request for recount made? What were the reasons given? When did the Canvassing Board decide to do a manual recount? What was the basis for determination that such a recount was the appropriate action? How late were the results?

Obviously, the list of scenarios is almost endless and the questions that would need to be asked in properly exercising discretion as to whether to ignore or not ignore late filed returns are numerous. The Secretary may, and should, consider all of the facts and circumstances.

The County Canvassing Boards are, indeed, mandated to certify and file their returns with the Secretary of State by 5:00 p.m. today, November 14, 2000. There is nothing, however, to prevent the County Canvassing Boards from filing with the Secretary of State further returns after completing a manual recount. It is then up to the Secretary of State, as the Chief Election Officer, to determine whether any such corrective or supplemental returns filed after 5:00 p.m. today, are to be ignored. Just as the County Canvassing Boards have the authority to exercise discretion in determining whether a manual recount should be done, the Secretary of State has the authority to exercise her discretion in reviewing that decision, considering all attendant facts and circumstances, and decide whether to

include or to ignore the late filed returns in certifying the election results and declaring the winner.

Just as the Secretary cannot decide ahead of time what late returns should or should not be ignored, it would not be proper for me to do so by injunction. I can lawfully direct the Secretary to properly exercise her discretion in making a decision on the returns, but I cannot enjoin the Secretary to make a particular decision, nor can I rewrite the Statute which, by its plain meaning, mandates the filing of returns by the Canvassing Boards by 5:00 p.m. on November 14, 2000.

I also note that although the Canvassing Boards cannot properly contest an election, an unsuccessful Candidate, or any qualified Elector, may file, pursuant to Section 102.168, *Florida Statutes*, a complaint in Circuit Court contesting the election results. One of the specific itemized grounds for such a challenge is the "rejection of a number of legal votes sufficient to change or place in doubt the result of the election."

Accordingly, it is

ORDERED AND ADJUDGED that the Secretary of State is directed to withhold determination as to whether or not to ignore late filed returns, if any, from Plaintiff Canvassing Boards, until due consideration of all relevant facts and circumstances consistent with the sound exercise of discretion. In all other respects, the Motion for Temporary Injunction is denied.

DONE AND ORDERED in Chambers at Tallahassee, Leon County, Florida, this 14th day of November, 2000.

/s/
TERRY P. LEWIS, Circuit Judge

APPENDIX F

FLORIDA STATUTES

TITLE 9—ELECTORS AND ELECTIONS

CHAPTER 102—CONDUCTING ELECTIONS AND ASCERTAINING THE RESULTS

* * * * *

102.111 Elections Canvassing Commission.

(1) Immediately after certification of any election by the county canvassing board, the results shall be forwarded to the Department of State concerning the election of any federal or state officer. The Governor, the Secretary of State, and the Director of the Division of Elections shall be the Elections Canvassing Commission. The Elections Canvassing Commission shall, as soon as the official results are compiled from all counties, certify the returns of the election and determine and declare who has been elected for each office. In the event that any member of the Elections Canvassing Commission is unavailable to certify the returns of any election, such member shall be replaced by a substitute member of the Cabinet as determined by the Director of the Division of Elections. If the county returns are not received by the Department of State by 5 p.m. of the seventh day following an election, all missing counties shall be ignored, and the results shown by the returns on file shall be certified.

(2) The Division of Elections shall provide the staff services required by the Elections Canvassing Commission.

102.112 Deadline for submission of county returns to the Department of State; penalties.

(1) The county canvassing board or a majority thereof shall file the county returns for the election of a

federal or state officer with the Department of State immediately after certification of the election results. Returns must be filed by 5 p.m. on the 7th day following the first primary and general election and by 3 p.m. on the 3rd day following the second primary. If the returns are not received by the department by the time specified, such returns may be ignored and the results on file at that time may be certified by the department.

(2) The department shall fine each board member $200 for each day such returns are late, the fine to be paid only from the board member's personal funds. Such fines shall be deposited into the[1] Election Campaign Financing Trust Fund, created by § 106.32.

(3) Members of the county canvassing board may appeal such fines to the Florida Elections Commission, which shall adopt rules for such appeals.

* * * * *

102.141 County canvassing board; duties.

* * * * *

(4) If the returns for any office reflect that a candidate was defeated or eliminated by one-half of a percent or less of the votes cast for such office, that a candidate for retention to a judicial office was retained or not retained by one-half of a percent or less of the votes cast on the question of retention, or that a measure appearing on the ballot was approved or rejected by one-half of a percent or less of the votes cast on such measure, the board responsible for certifying the results

[1] The trust fund expired, effective November 4, 1996, by operation of § 19(f), Art. III of the State Constitution.

of the vote on such race or measure shall order a recount of the votes cast with respect to such office or measure. A recount need not be ordered with respect to the returns for any office, however, if the candidate or candidates defeated or eliminated from contention for such office by one-half of a percent or less of the votes cast for such office request in writing that a recount not be made. Each canvassing board responsible for conducting a recount shall examine the counters on the machines or the tabulation of the ballots cast in each precinct in which the office or issue appeared on the ballot and determine whether the returns correctly reflect the votes cast. If there is a discrepancy between the returns and the counters of the machines or the tabulation of the ballots cast, the counters of such machines or the tabulation of the ballots cast shall be presumed correct and such votes shall be canvassed accordingly.

* * * * *

102.166 Protest of election returns; procedure.

(1) Any candidate for nomination or election, or any elector qualified to vote in the election related to such candidacy, shall have the right to protest the returns of the election as being erroneous by filing with the appropriate canvassing board a sworn, written protest.

(2) Such protest shall be filed with the canvassing board prior to the time the canvassing board certifies the results for the office being protested or within 5 days after midnight of the date the election is held, whichever occurs later.

(3) Before canvassing the returns of the election, the canvassing board shall:

(a) When paper ballots are used, examine the tabulation of the paper ballots cast.

(b) When voting machines are used, examine the counters on the machines of nonprinter machines or the printer-pac on printer machines. If there is a discrepancy between the returns and the counters of the machines or the printer-pac, the counters of such machines or the printer-pac shall be presumed correct.

(c) When electronic or electromechanical equipment is used, the canvassing board shall examine precinct records and election returns. If there is a clerical error, such error shall be corrected by the county canvassing board. If there is a discrepancy which could affect the outcome of an election, the canvassing board may recount the ballots on the automatic tabulating equipment.

(4)(a) Any candidate whose name appeared on the ballot, any political committee that supports or opposes an issue which appeared on the ballot, or any political party whose candidates' names appeared on the ballot may file a written request with the county canvassing board for a manual recount. The written request shall contain a statement of the reason the manual recount is being requested.

(b) Such request must be filed with the canvassing board prior to the time the canvassing board certifies the results for the office being protested or within 72 hours after midnight of the date the election was held, whichever occurs later.

(c) The county canvassing board may authorize a manual recount. If a manual recount is authorized, the county canvassing board shall make a reasonable effort to notify each candidate whose race is being recounted of the time and place of such recount.

(d) The manual recount must include at least three precincts and at least 1 percent of the total votes cast for such candidate or issue. In the event there are less than

three precincts involved in the election, all precincts shall be counted. The person who requested the recount shall choose three precincts to be recounted, and, if other precincts are recounted, the county canvassing board shall select the additional precincts.

(5) If the manual recount indicates an error in the vote tabulation which could affect the outcome of the election, the county canvassing board shall:

(a) Correct the error and recount the remaining precincts with the vote tabulation system;

(b) Request the Department of State to verify the tabulation software; or

(c) Manually recount all ballots.

(6) Any manual recount shall be open to the public.

(7) Procedures for a manual recount are as follows:

(a) The county canvassing board shall appoint as many counting teams of at least two electors as is necessary to manually recount the ballots. A counting team must have, when possible, members of at least two political parties. A candidate involved in the race shall not be a member of the counting team.

(b) If a counting team is unable to determine a voter's intent in casting a ballot, the ballot shall be presented to the county canvassing board for it to determine the voter's intent.

(8) If the county canvassing board determines the need to verify the tabulation software, the county canvassing board shall request in writing that the Department of State verify the software.

(9) When the Department of State verifies such software, the department shall:

(a) Compare the software used to tabulate the votes with the software filed with the Department of State pursuant to § 101.5607; and

(b) Check the election parameters.

(10) The Department of State shall respond to the county canvassing board within 3 working days.

• • • • •

102.168 Contest of election.

(1) Except as provided in § 102.171, the certification of election or nomination of any person to office, or of the result on any question submitted by referendum, may be contested in the circuit court by any unsuccessful candidate for such office or nomination thereto or by any elector qualified to vote in the election related to such candidacy, or by any taxpayer, respectively.

(2) Such contestant shall file a complaint, together with the fees prescribed in chapter 28, with the clerk of the circuit court within 10 days after midnight of the date the last county canvassing board empowered to canvass the returns certifies the results of the election being contested or within 5 days after midnight of the date the last county canvassing board empowered to canvass the returns certifies the results of that particular election following a protest pursuant to § 102.166(1), whichever occurs later.

(3) The complaint shall set forth the grounds on which the contestant intends to establish his or her right to such office or set aside the result of the election on a submitted referendum. The grounds for contesting an election under this section are:

(a) Misconduct, fraud, or corruption on the part of any election official or any member of the canvassing board sufficient to change or place in doubt the result of the election.

(b) Ineligibility of the successful candidate for the nomination or office in dispute.

(c) Receipt of a number of illegal votes or rejection of a number of legal votes sufficient to change or place in doubt the result of the election.

(d) Proof that any elector, election official, or canvassing board member was given or offered a bribe or reward in money, property, or any other thing of value for the purpose of procuring the successful candidate's nomination or election or determining the result on any question submitted by referendum.

(e) Any other cause or allegation which, if sustained, would show that a person other than the successful candidate was the person duly nominated or elected to the office in question or that the outcome of the election on a question submitted by referendum was contrary to the result declared by the canvassing board or election board.

(4) The canvassing board or election board shall be the proper party defendant, and the successful candidate shall be an indispensable party to any action brought to contest the election or nomination of a candidate.

(5) A statement of the grounds of contest may not be rejected, nor the proceedings dismissed, by the court for any want of form if the grounds of contest provided in the statement are sufficient to clearly inform the defendant of the particular proceeding or cause for which the nomination or election is contested.

(6) A copy of the complaint shall be served upon the defendant and any other person named therein in the same manner as in other civil cases under the laws of this state. Within 10 days after the complaint has been

served, the defendant must file an answer admitting or denying the allegations on which the contestant relies or stating that the defendant has no knowledge or information concerning the allegations, which shall be deemed a denial of the allegations, and must state any other defenses, in law or fact, on which the defendant relies. If an answer is not filed within the time prescribed, the defendant may not be granted a hearing in court to assert any claim or objection that is required by this subsection to be stated in an answer.

(7) Any candidate, qualified elector, or taxpayer presenting such a contest to a circuit judge is entitled to an immediate hearing. However, the court in its discretion may limit the time to be consumed in taking testimony, with a view therein to the circumstances of the matter and to the proximity of any succeeding primary or other election.

(8) The circuit judge to whom the contest is presented may fashion such orders as he or she deems necessary to ensure that each allegation in the complaint is investigated, examined, or checked, to prevent or correct any alleged wrong, and to provide any relief appropriate under such circumstances.

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FLORIDA STATUTES
TITLE 9—ELECTORS AND ELECTIONS
CHAPTER 106—CAMPAIGN FINANCING

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106.23 Powers of the Division of Elections.

(1) In order to carry out the responsibilities prescribed by § 106.22, the Division of Elections is empowered to subpoena and bring before its duly authorized representatives any person in the state, or any person doing business in the state, or any person who

has filed or is required to have filed any application, document, papers, or other information with an office or agency of this state or a political subdivision thereof and to require the production of any papers, books, or other records relevant to any investigation, including the records and accounts of any bank or trust company doing business in this state. Duly authorized representatives of the division are empowered to administer all oaths and affirmations in the manner prescribed by law to witnesses who shall appear before them concerning any relevant matter. Should any witness fail to respond to the lawful subpoena of the division or, having responded, fail to answer all lawful inquiries or to turn over evidence that has been subpoenaed, the division may file a complaint before any circuit court of the state setting up such failure on the part of the witness. On the filing of such complaint, the court shall take jurisdiction of the witness and the subject matter of said complaint and shall direct the witness to respond to all lawful questions and to produce all documentary evidence in the witness's possession which is lawfully demanded. The failure of any witness to comply with such order of the court shall constitute a direct and criminal contempt of court, and the court shall punish said witness accordingly. However, the refusal by a witness to answer inquiries or turn over evidence on the basis that such testimony or material will tend to incriminate such witness shall not be deemed refusal to comply with the provisions of this chapter.

(2) The Division of Elections shall provide advisory opinions when requested by any supervisor of elections, candidate, local officer having election-related duties, political party, political committee, committee of continuous existence, or other person or organization engaged in political activity, relating to any provisions or possible violations of Florida election laws with respect to actions such supervisor, candidate, local officer having election-related duties, political party, committee, person, or organization has taken or

proposes to take. A written record of all such opinions issued by the division, sequentially numbered, dated, and indexed by subject matter, shall be retained. A copy shall be sent to said person or organization upon request. Any such person or organization, acting in good faith upon such an advisory opinion, shall not be subject to any criminal penalty provided for in this chapter. The opinion, until amended or revoked, shall be binding on any person or organization who sought the opinion or with reference to whom the opinion was sought, unless material facts were omitted or misstated in the request for the advisory opinion.

APPENDIX G
SUPREME COURT OF FLORIDA

Nos. SC00-2346, SC00-2348 & SC00-2349

PALM BEACH COUNTY CANVASSING BOARD,
Petitioner,
vs.
KATHERINE HARRIS, ETC., ET AL.
Respondents.

VOLUSIA COUNTY CANVASSING BOARD, ET AL.,
Appellants,
vs.
KATHERINE HARRIS, ETC., ET AL.
Appellees.

FLORIDA DEMOCRATIC PARTY,
Appellant,
vs.
KATHERINE HARRIS, ETC., ET AL.
Appellees.

FROM THE CIRCUIT COURT, SECOND JUDICIAL CIRCUIT,
IN AND FOR LEON COUNTY, FLORIDA

ANSWER BRIEF OF INTERVENOR / RESPONDENT GEORGE W. BUSH

* * * * *

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In the present context, *federal* law also places additional constraints on courts that require them strictly to adhere to the legislature's prescribed manner for conducting an election to choose the State's presidential electors. Under 3 U.S.C. §5, a State is required to select its electors "by laws enacted *prior* to" election day. *See* 3 U.S.C. §5 (emphasis added). The purpose of the statute is to ensure that neither the Legislature, nor the Executive, nor the courts can change the applicable

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rules once the voters have gone to the polls. Florida law on November 7, 2000, unambiguously required county canvassing boards to count, and recount if necessary, and manually recount if they chose, within the time prescribed by law. Under Section 102.112 the Secretary of State was given discretion sometimes not to ignore late results. But no provision of state law in effect prior to the election, however, granted *courts* equitable power to disregard both the deadline and the Secretary's exercise of reasoned discretion.[15] It would

[15] Indeed, by operation of the Supremacy Clause, Article VI, U.S. Constitution, federal law incorporates by reference whatever processes a state establishes by law for choosing electors. The United States Constitution provides that the *legislatures* of the States will prescribe the manner in which presidential electors are chosen, Article II, Section 1 U.S. Constitution and Congress has provided in federal law that "[t]he electors of President and Vice President shall be appointed, in each State, on the Tuesday next

[Footnote continued on next page]

also violate the United States Constitution for the Secretary of State to permit the 3 counties to complete its manual recount and certify those results. The selective manual recounts authorize

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county boards to engage in arbitrary and unequal counting of votes, and result in the disparate treatment of Florida voters based solely on where within the state they happen to reside.

This scheme, as applied, violates the United States Constitution in three respects. First, it dilutes the votes of Florida voters, both within and without the counties that are manually counted, by counting their votes differently based upon where they reside, in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment. *See, e.g., O'Brien v. Skinner*, 414 U.S. 524 (1974). Second, because the manual

[Footnote continued from previous page]

after the first Monday in November" in an election year. 3 U.S.C. § 1. Congress has further provided that if a State "has failed to make a choice on the day prescribed by law," it falls to the legislature of the State to determine how the electors will be appointed. 3 U.S.C. § 2. In the present case, the day prescribed by law was Tuesday, November 7, and the State of Florida held an election on that day *subject to the procedures, including reporting procedures and deadlines, established by state law*. It follows, therefore under the relevant federal statutes and the Supremacy Clause that all actors at the state level - including judges -- are bound to respect the choices made by the Florida legislature as to the process of selecting the state's presidential electors. It would therefore violate federal law for the state *courts* to use equitable doctrines to supplement the *legislature's* judgment, reflected in the statutes of the state, regarding the methods and time limits for selecting presidential electors.

recount statute prescribes no meaningful standards for officials conducting such recounts, it permits the invasion of the liberty interest in voting in an arbitrary and capricious manner. *See, e.g., Roe v. Alabama*, 43 F.3d 574, 580 (11th Cir. 1995). Finally, because the right to vote directly implicates the right of association under the First Amendment, *Williams v. Rhodes*, 393 U.S. 23, 30 (1968), it falls squarely within the principle that state actors cannot exercise unconstrained discretion over the implementation of laws that touch upon First Amendment rights. *See City of Lakewood v. Plain Dealer Publishing*, 486 U.S. 750, 763 (1988). For these reasons, allowing the manual recounts to proceed would violate the United States Constitution.